

No. 11707

United States  
Circuit Court of Appeals  
For the Ninth Circuit

CONTINENTAL CASUALTY COMPANY, a Corporation,  
Appellant,

vs.

M. C. SCHAEFER, an Individual doing business as  
CONCRETE CONSTRUCTION COMPANY,  
Appellee.

and

A. J. GOERIG and CLYDE PHILP,  
Appellants,

vs.

CONTINENTAL CASUALTY COMPANY, a Corporation,  
Appellee.

and

SAM MACRI, DON MACRI and JOE MACRI,  
Appellants,

vs.

M. C. SCHAEFER, an Individual doing business as  
CONCRETE CONSTRUCTION COMPANY,  
Appellee.

Transcript of Record  
In Five Volumes  
VOLUME I  
Pages 1 to 468

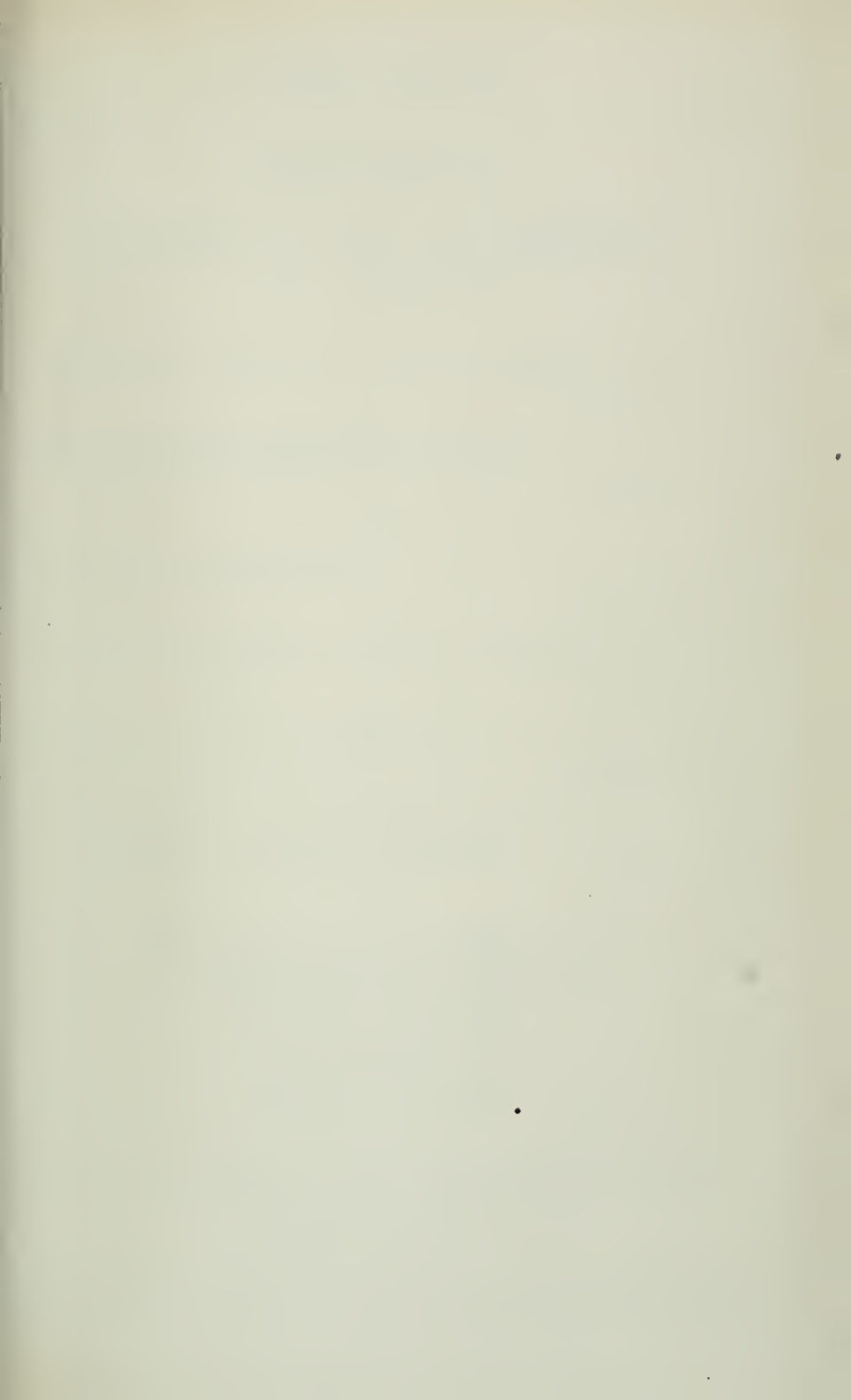
Upon Appeals from the District Court of the United States  
for the Eastern District of Washington  
Southern Division

FILED

MAR - 4 1948

PAUL P. O'BRIEN









No. 11707

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit

---

CONTINENTAL CASUALTY COMPANY, a Corporation,  
Appellant,

vs.

M. C. SCHAEFER, an Individual doing business as  
CONCRETE CONSTRUCTION COMPANY,  
Appellee.

and

A. J. GOERIG and CLYDE PHILP,  
Appellants,

vs.

CONTINENTAL CASUALTY COMPANY, a Corporation,  
Appellee.

and

SAM MACRI, DON MACRI and JOE MACRI,  
Appellants,

vs.

M. C. SCHAEFER, an Individual doing business as  
CONCRETE CONSTRUCTION COMPANY,  
Appellee.

---

Transcript of Record  
In Five Volumes  
VOLUME I  
Pages 1 to 468

---

Upon Appeals from the District Court of the United States  
for the Eastern District of Washington  
Southern Division

---



# INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Adoption of Points on Appeal.....	2261
Affidavit of Service, Kenneth C. Hawkins....	134
Alternate Proposal If the Foregoing Proposed Findings of Fact, Conclusions of Law and Judgment Be Not Entered, Macri's Proposed	91
Conclusions of Law.....	92
Findings of Fact.....	92
Judgment .....	93
Amended Complaint .....	2
Amended Reply and Cross-Complaint to Cross- Complaint of Defendants Macri.....	66
Amendment to Answer of Continental Casualty Company .....	79
Answer .....	46
Answer and Cross-Complaint.....	13
Exhibit A—Letter 11/30/44 to Concrete Construction Co., /s/ Sam Macri .....	38
B—Letter 1/3/45 to Concrete Construction Co., /s/ Sam Macri .....	39
C—Notice of Levy and Tax Lien	40
D—Notice of Levy and Tax Lien	43

INDEX	PAGE
Answer of Continental Casualty Company...	61
Answer to Cross-Complaint of Defendants Clyde Philp and A. J. Goerig.....	64
Appeal:	
Adoption of Points on.....	2261
Appellant's (Continental Casualty Co.) Designation of Contents of Record on..	125
Appellant's (Continental Casualty Co.) Statement of Points on.....	2258
Appellants' (Goerig and Philp) Designa- tion of Contents of Record on.....	131
Appellants' (Goerig and Philp) State- ment of Points on.....	133
Appellants' (Macris) Designation of Con- text of Record to Be Supplemented on.	141
Appellants' (Macris) Statement of Points on .....	138
Appellee's (M. C. Schaefer) Designation of Contents of Record of.....	121
Bond for Costs on.....	129
Certificate of Clerk to Transcript of Rec- ord on .....	2253, 2256
Notice of	
Continental Casualty Co.....	118
Goerig and Philp.....	129
Sam Macri, Don Macri, Joe Macri...	136
Order Extending Time for Preparation and Docketing of Record on.....	127
Statement of Points on.....	124
Supersedeas and Cost Bond on.....	119

## INDEX

## PAGE

Appellant's (Continental Casualty Co.) Designation of Contents of Record on Appeal....	125
Appellant's (Continental Casualty Co.) Statement of Points.....	2258
Appellant's (Continental Casualty Co.) Supplemental Designation of Record.....	144
Appellants' (A. J. Goerig and Clyde Philp) Designation and Contents of Record on Appeal .....	131
Appellants' (A. J. Goerig and Clyde Philp) Statement of Points on Appeal.....	133
Appellants' (Sam Macri, Don Macri and Joe Macri) Designation of Context of Record to Be Supplemented on Appeal.....	141
Appellants' (Sam Macri, Don Macri and Joe Macri) Statement of Points on Appeal....	138
Appellee's (M. C. Shaefer) Designation of Contents of Record of Appeal.....	121
Bill of Particulars.....	50
Agreement Terminating Joint Venture...	52
Bond for Costs on Appeal.....	129
Bond on Appeal to Circuit Court of Appeals, Ninth District.....	137
Certificate of Clerk to Transcript of Record on Appeal .....	2253, 2256
Cross-Complaint .....	49

INDEX	PAGE
Deposition of Clyde Philp.....	2232
—direct .....	2232
Findings of Fact and Conclusions of Law....	94
Conclusions of Law.....	109
Findings of Fact.....	95
Finds of Fact and Conclusions of Law, Macri's Proposed.....	83
Conclusions of Law.....	90
Findings of Fact.....	84
Judgment .....	112
Judgment, Macri's Proposed.....	80
Motion for New Trial.....	115
Names and Addresses of Attorneys of Record.	1
Notice of Appeal:	
Continental Casualty Co. ....	118
Goerig and Philp .....	129
Sam Macri, Don Macri and Joe Macri...	136
Order Denying Motions for New Trial.....	117
Order Determining Amount of Bond.....	118
Order Directing Clerk to Transmit Exhibits to Circuit Court of Appeals.....	127, 147
Order Extending Time to File Supplement of Record .....	145, 149
Order Extending Time for Preparation and Docketing of Record on Appeal.....	127
Order on Pre-Trial.....	76

INDEX	PAGE
Record of Proceedings at the Trial.....	151, 2239
Court's Opinion .....	2208
Deposition of Clyde Philp.....	1412
—direct .....	1412
Deposition of Harold T. Nelson:	
—direct .....	1489
—cross .....	1535
—redirect .....	1544
—recross .....	1546
Witnesses, Defendants':	
Anderson, Arthur	
—direct .....	1777
—cross .....	1800
—redirect .....	1821, 1823
—recross .....	1822, 1824
Ashley, Verne E.	
—direct .....	1846
—cross .....	1863
—redirect .....	1880, 1885
—recross .....	1884
Black, James A.	
—direct .....	1556
—cross .....	1573
—redirect .....	1583, 1586
—recross .....	1586
Callahan, Elizabeth	
—direct .....	663, 1825, 1939
—cross .....	1842, 1973, 2068
—redirect .....	2005, 2082, 2090
—recross .....	2086

	INDEX	PAGE
Witnesses, Defendants'—(Continued)		
Costello, J. A.		
—direct .....		310
—cross .....		311, 317
—redirect .....		316, 318
Hance, Tolliff		
—direct .....		1887
—cross .....		1904
—redirect .....		1932
Heers, J. C.		
—direct .....		245
Hjorth, Niels W.		
—direct .....		1695
—cross .....		1704
—redirect .....		1708, 1710
—recross .....		1710
Klugg, John		
—direct .....		2032
—cross .....		2038, 2065
—redirect .....		2042, 2063
—recross .....		2056, 2065
Macri, Sam		
—direct .....		1422, 1430, 1588, 1933
—cross .....		1595, 1935
—redirect .....		1662, 1671, 1692, 1938
—recross .....		1685, 1693, 1938



## INDEX

## PAGE

## Witnesses, Defendants'—(Continued)

## Moorehead, R. M.

—direct .....	252
—cross .....	262
—redirect .....	273

## Nutley, V. E.

—direct .....	238
—cross .....	244

## Pease, H. W.

—direct .....	155
---------------	-----

## Reynolds, G. R.

—direct .....	274, 291
—cross .....	294, 305
—redirect .....	304, 306, 309
—recross .....	307

## Schaefer, M. C. (Adverse)

—direct .....	1711, 1721
—cross .....	1723

## Sektan, Marvin

—direct .....	318
—cross .....	321
—redirect .....	323

## Staples, George

—direct .....	1379, 1729
—cross .....	1395, 1406, 1752, 1773
—redirect .....	1409, 1772, 1774
—recross .....	1776

	INDEX	PAGE
Witnesses, Plaintiff's:		
Black, James A.		
—direct	.....	850
—cross	.....	857
—redirect	.....	873, 886, 890
—recross	.....	884, 888, 891
Bufton, Lawrence E.		
—direct	.....	1133, 1147
—voir dire	.....	1145
—cross	.....	1189
—redirect	.....	1232
—recross	.....	1235
Darcy, Patrick L.		
—direct	.....	421
—cross	.....	468, 484, 529
—redirect	.....	511, 563, 584
—recross	.....	587
Gallowa, Theodore		
—direct	.....	725
—cross	.....	730
—redirect	.....	742
—recross	.....	743
Hendershott, L. R.		
—direct	.....	1239, 1246
—cross	.....	1265
—redirect	.....	1308, 1351
—recross	.....	1310

## INDEX

## PAGE

## Witnesses, Plaintiff's—(Continued)

Hewitt, C. E.

—direct .....	806, 826
—voir dire .....	818
—cross .....	828

Holmes, Jack

—direct .....	762
—cross .....	765

Hunter, Allyn R.

—direct .....	918
—cross .....	961
—redirect .....	1013

Keeler, Edward C.

—direct .....	1016
—cross .....	1027

Lyons, Isaac A.

—direct .....	1059
—cross .....	1064

Macri, Sam (Adverse)

—direct .....	1300
---------------	------

Mercille, A. E.

—direct .....	774
—cross .....	781

Miller, Jack

—direct .....	747
—cross .....	752

	INDEX	PAGE
Witnesses, Plaintiff's—(Continued)		
Monrad, Robert		
—direct .....		892
—cross .....		900
—redirect .....		917
Robbins, Hawley		
—direct .....	1029, 1039	
—cross .....	1038, 1041	
Schaefer, M. C.		
—direct .....	178, 212, 279, 325, 342 508, 582, 1317, 1335	
—voir dire .....	339, 1334	
—cross .....	357, 364, 510, 583, 1352, 2093	
—redirect .....	407, 1370	
—recross .....	416, 1371	
Schaefer, William E.		
—direct .....	502, 1071, 1102	
—cross .....	1110	
Stickney, M. E.		
—direct .....		588
—cross .....		598
—redirect .....		650
—recross .....		657
Waltie, Fred		
—direct .....		674
—cross .....		700
—redirect .....		722
—recross .....		724

## INDEX

## PAGE

## Witnesses, Plaintiff's (Rebuttal):

Darcy, Patrick L.

—direct .....2162, 2177

—cross ..... 2183

—redirect ..... 2188

Macri, Sam

—direct ..... 2030

Schaefer, M. C.

—direct .....2019, 2102, 2112

—cross .....2023, 2131

—redirect ..... 2156

—recross ..... 2157

Schaefer, William E.

—direct ..... 2189

—cross ..... 2190

## Reply to Answer and Cross-Complaint of Sam

Macri, Don Macri and Joe Macri..... 58

Statement of Points on Appeal..... 124

## Statement of Points on Appeal of Appellants

Sam Macri, Don Macri and Joe Macri..... 2262

## Stipulation for Transmission of Exhibits to

Circuit Court of Appeals..... 123

Supersedeas and Cost Bond on Appeal..... 119

Transcript of Testimony of A. J. Goerig..... 2239

—direct .....2241, 2243

—cross ..... 2248



NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

OLSON & PALMER,

Miller Building,

Yakima, Washington

Attorneys for use Plaintiff and Appellee,  
M. C. Schaefer.

BRETHORST, HOLMAN, FOWLER & DEWAR,

17th Floor Hoge Building,

Seattle 4, Washington,

Attorneys for Appellants, Macri.

BROWN & HAWKINS,

Miller Building,

Yakima, Washington,

Attorneys for Appellants, A. J. Goerig and  
Clyde Philp.

EUGENE D. IVY,

Miller Building,

Yakima, Washington,

Attorney for Appellant and Appellee, Con-  
tinental Casualty Company.

In the District Court of the United States for the Eastern District of Washington, Southern Division.

Civil No. 246

THE UNITED STATES OF AMERICA for the use of M. C. SCHAEFER, an individual doing business as Concrete Construction Company,  
Plaintiff,

vs.

SAM MACRI, DON MACRI, JOE MACRI, A. J. GOERIG, and CLYDE PHILP, individuals and co-partners doing business as Macri Company, and CONTINENTAL CASUALTY COMPANY, a corporation,  
Defendants.

### AMENDED COMPLAINT

For cause of action against the defendants plaintiff alleges:

#### 1.

This action is brought in the name of the United States of America as plaintiff for the use of M. C. Schaefer, an individual doing business as Concrete Construction Company, under and by virtue of the authority granted by an Act of Congress approved August 24, 1935 (c.642, Sections 1 and 2, 49 Statutes at Large 793, 794).



2.

That M. C. Schaefer is an individual doing business as Concrete Construction Company, is the sole owner of said business and a resident of the State of Oregon.

3.

That Sam Macri, Don Macri, Joe Macri, A. J. Goerig and Clyde Philp are individuals and insofar as all matters herein referred to and material hereto are concerned, were co-partners doing business under the assumed name of Macri Company and Macri & Company, and are residents of King County, State of Washington, and said defendants are hereby referred to collectively as "Macri Company." [2\*]

4.

That at all times herein mentioned the defendant Continental Casualty Company was and now is a corporation authorized to transact a surety business in the State of Washington.

5.

That on or about the 7th day of December, 1943, the United States of America through the Department of Interior, and the defendants Macri Company made and entered into a certain contract, being contract No. 12r-14825 for earthwork, pipelines and structures, laterals 59.3 to 69.8 and sub-laterals Roza Division, Yakima Project, Washing-

---

\*Page numbering appearing at foot of page of original certified Transcript of Record.

ton, wherein and whereby said defendant contractors contracted to furnish materials and perform work in accordance with the terms of said contract for the sum of \$128,550.95.

## 6.

That on or about the 7th day of December, 1943, to secure the prompt payment to all persons supplying labor or materials employed or used in the prosecution of the work provided for in said contract, said Macri Company as Principal and the Continental Casualty Company, a corporation, as Surety, made, executed and delivered to the United States of America as obligee a bond or undertaking as provided by law in the sum of \$64,275.48, which said bond or undertaking was and is by its terms binding upon said surety and upon said principals, their heirs, executors, successors or assigns, and has been at all times since said time and now is in full force and effect.

## 7.

That the aforesaid contract was and now is a contract for the prosecution and completion of a public work of the United States within the meaning of the Act of Congress referred to hereinabove, and said contract was performed and executed at or near Yakima, Yakima County, in the Eastern District of the State of Washington. [3]

## 8.

That heretofore and on or about the 14th day of March, 1944, the defendants Macri Company,

writing their name "Macri & Company" entered into a subcontract in writing with the Concrete Construction Company wherein and whereby said Macri Company subcontracted to said Concrete Construction Company the following work "the furnishing of all labor and necessary equipment to do all of the concrete work, form work, cut, bend and install all reinforcing steel, all such work as shown on the plans and specified in the specifications No. 1062, Contract No. 12r-14825, Roza Division, Yakima Project, Washington." All of the excavating and all of the materials necessary for the performance of said subcontract by the Concrete Construction Company were to be furnished by the defendants Macri Company with the exception of form wire, nails and curing material, said excavating and said materials to be furnished, done and supplied in accordance with the plans and specifications above referred to and in proper time for the performance of said subcontract by the plaintiff Concrete Construction Company.

A copy of said subcontract is attached to the original complaint on file herein marked Exhibit "B" and by reference made a part hereof as though set forth in full herein.

9.

That pursuant to said subcontract above referred to said subcontractor Concrete Construction Company entered into the diligent performance of his said subcontract and commenced with the furnishing of labor and materials and the performance of services called for in said subcontract.

## 10.

That notwithstanding the defendant Macri Company's agreement to do the necessary excavation work and to furnish the necessary materials, with the exception of the form wire, nails and curing materials, and to construct and furnish the necessary roads for the timely, orderly and proper performance of plaintiff's subcontract, the defendants failed, neglected and refused from the beginning or at any time to perform such [4] excavating either on time or in accordance with the specifications of the Bureau of Reclamation and failed, neglected and refused from the beginning or at all to furnish materials of proper quality or of sufficient quantity and on time, in that said materials, and particularly the lumber, was used lumber, full of knot holes, broken, warped, dirty and unfit for use, was not furnished on time or in sufficient quantities to permit the plaintiff to perform his contract and the excavating work required to be done by the defendants was not done in time nor in accordance with the specifications of the Bureau of Reclamation.

## 11.

That immediately after the commencement of said work the plaintiff Construction Company, acting through M. C. Schaefer and its authorized representatives, complained to the defendants Macri Company concerning their failure to comply with their said agreement in the matters above set forth, whereupon the defendants Macri Company orally

requested the plaintiff Concrete Construction Company to nevertheless proceed with the work called for in said subcontract and orally requested the said plaintiff Concrete Construction Company to do and perform the extra work required because of said Macri Company's non-performance, and orally requested the said Concrete Construction Company to keep an account of said costs, and said Macri Company agreed that in consideration of the Concrete Construction Company's performing such extra services and continuing with the performance of said subcontract and with the doing of the work called for by said subcontract, notwithstanding Macri Company's inability and neglect to perform its part of said contract as herein specified, that Macri Company would pay the full costs of said work and the performance thereof irrespective of the subcontract price; that said Macri Company orally repeated said promises and assurances throughout the performance of said work by the Concrete Construction Company, and by reason thereof and in reliance thereon and pursuant to said agreement the Concrete Construction Company continued with said [5] subcontract and completed all of the work required thereby, incurring additional costs because of said Macri Company's neglect to perform his part of said contract as above set forth.

## 12.

That pursuant to said subcontract and to said oral agreement hereinabove set forth, the plaintiff Concrete Construction Company between the 14th



day of March, 1944, and the first day of May, 1945, furnished labor and materials and performed services for said defendant Macri Company at their special instance and request of the reasonable and agreed value of \$90,233.53, an itemized list and statement of said work, labor, materials and services being attached to the original complaint on file herein and marked Exhibit "A" and by reference made a part hereof as though set forth in full herein.

## 13.

That the plaintiff Concrete Construction Company has made demand upon the defendants, and each of them, for payment of said sum, but that said defendants have failed, neglected and refused to pay the same except the sum of \$32,614.66, leaving a balance now due, owing and unpaid in the amount of \$57,618.87, which amount, together with interest at 6% to November 1, 1945, amounting to \$3,745.57, or a total of \$61,364.44, is now due and unpaid, of which amount \$57,618.87 draws interest at 6% per annum from November 1, 1945, until paid in addition to the interest herein set forth.

## 14.

That pursuant to the terms and provisions of said subcontract the plaintiff Concrete Construction Company in writing on November 13, 1944, demanded arbitration of the matters herein set forth, a copy of which demand is attached to the original complaint, marked Exhibit "C" and by reference

thereto made a part hereof as though set forth in full herein; that more than sixty days have elapsed since the request for such arbitration and no arbitration was ever had and no arbitration decision reached; that plaintiff Concrete Construction Company's claim has been presented to the defendants Macri Company and said plaintiff's enter [6] claim rejected as being spurious.

## 15.

That more than ninety days have elapsed since the last of said work, labor and materials were furnished by said Concrete Construction Company as hereinabove set forth, and less than one year has elapsed since the complete performance and final settlement of said contract No. 12r-14825 was made. The final settlement and acceptance under said contract was made on March 31, 1945.

## 16.

That on or about December 1, 1945, the plaintiff, Concrete Construction Company notified the defendants, and each of them, that said plaintiff exercised his option under said subcontract to bring suit, no arbitration decision having been reached, and further notified said defendant that in any event arbitration was revoked, the following being a copy of said notice:

“In Mr. Schaefer's letter to you of November 13th in the eighth paragraph thereof, he requested arbitration of the matters in dispute as provided in clause 9 of the subcontract. Your

correspondence and the position you have taken subsequent to this request is in effect a refusal to arbitrate and you have apparently refused at all times to recognize any claim in Mr. Schaefer at all. In any event, more than sixty days have elapsed since Mr. Schaefer's first written request for arbitration and you are now notified that Mr. Schaefer in accordance with the provisions of said clause 9 exercises his option to bring suit upon the matter in dispute. You are further notified that in any event arbitration is revoked."

## 17.

The ground upon which the jurisdiction of this court is invoked is that the action arises under the Act of Congress referred to hereinabove which expressly directs the bringing of such action in this court to-wit: The United States District Court, Eastern District of Washington, Southern Division, being the District in which said contract was to be and was performed and executed.

## Alternative Second Cause of Action

In the alternative and in the event that the court shall determine that the defendants Macri Company did not orally agree under a valid [7] agreement to pay for the increased costs of the performance of said subcontract by reason of Macri Company's failure to perform its part of its contract, all as hereinabove alleged, plaintiffs allege for a second and alternative cause of action:



## 1.

Plaintiff alleges paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 as the first 11 paragraphs of plaintiff's second cause of action to the same effect as though re-set forth and re-alleged in full.

## 2.

That the reasonable value and cost of the materials required to be furnished and the labor and services required to be performed by the Concrete Construction Company in the performance of its said subcontract had Macri Company complied with the terms and provisions of its contract in the particulars hereinabove set forth would have been \$35,554.12.

That the reasonable cost and value of the materials required to be furnished and the labor and services required to be performed in the performance of the said subcontract by the Concrete Construction Company by reason of and because of said defendant Macri Company's nonperformance of its said contract in not furnishing the required lumber and materials of proper quality, quantity or at the proper times, in failing to furnish roads and in failing to do the excavating which was required to be done by the plaintiff in accordance with the Bureau of Reclamation specifications and sufficiently in advance of plaintiff's requirements and on time is \$90,233.53, to the plaintiff Concrete Construction Company's damage in the sum of \$57,618.87 by reason of said Macri Company's breach of and failure to perform its part of said subcontract.

## 3.

Plaintiff's re-allege paragraphs 13, 14, 15, 16 and 17 of plaintiff's first cause of action to the same extent and to the same effect as though re-alleged and set forth herein. [8]

Wherefore, Plaintiff prays that it have and recover judgment against the defendants, and each of them jointly and severally, for the use and benefit of M. C. Schaefer, doing business as Concrete Construction Company in the sum of \$61,364.44, together with interest on \$57,618.87 thereof from November 1, 1945, at 6% until paid on plaintiff's first cause of action, together with plaintiff's attorney's fees herein to be fixed by the court; or in the alternative that the plaintiff have and recover judgment against the defendants, and each of them jointly and severally for the use and benefit of M. C. Schaefer, doing business as Concrete Construction Company, in the sum of \$61,364.44, together with interest on \$57,618.87 thereof from November 1, 1945, at 6% until paid on plaintiff's second and alternative cause of action, together with plaintiff's reasonable attorney's fees herein to be fixed by the court, and that plaintiff further have and recover his costs and disbursements herein expended and incurred, and for such other and further relief as to the court may seem just and proper in the premises.

/s/ HARRY L. OLSON,

/s/ FRED C. PALMER,

Attorneys for Plaintiff,

[Endorsed]: Filed Jan. 24, 1946. [9]

[Title of District Court and Cause.]

## ANSWER AND CROSS-COMPLAINT

Come now the defendants Sam Macri, Don Macri and Joe Macri, and answering the first cause of action of the amended complaint of the plaintiff, admit, deny and allege as follows:

1.

Answering paragraph 1 thereof, these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in said paragraph contained, and therefore deny the same and demand proof thereof.

2.

Answering paragraph 2, these defendants admit the allegations therein.

3.

Answering paragraph 3, these defendants admit that these answering defendants, Sam Macri, Don Macri and Joe Macri, were at all times mentioned in the amended complaint herein co-partners and doing business as Macri & Co., also known and being the same entity as Macri & Company; deny that the defendants A. J. Goerig and Clyde Philp, or either of them, is now or ever was a member of said partnership; and allege that with respect to matters herein material the said partnership composed of these answering defendants d/b/a

Macri & Co. was a joint adventurer with the defendants A. J. Goerig and Clyde Philp under a written joint venture agreement dated December 11, 1943. [10]

## 4.

Answering paragraph 4, these defendants admit the same.

## 5.

Answering paragraph 5, these answering defendants admit that, together with their aforesaid joint adventurers, they made and entered into the certain written contract described in said paragraph 5, also designated as Specification No. 1062, but they deny with respect thereto that they contracted to furnish materials and perform work in accordance with said contract for any sums or amounts other than as determined by the terms and conditions of said contract, the bid submitted in furtherance thereof and the quantities of work determined and certified as performed by these answering defendants.

## 6.

Answering paragraph 6, these answering defendants admit that they, together with their aforesaid joint adventurers, furnished good and sufficient written bond as required by the aforesaid written contract, which bond is a public document in possession of the United States of America and is equally available to all parties litigant in this action ;

and that save and except as shown and stated by said original of executed bond these answering defendants deny each and every allegation, statement and thing contained in paragraph 6.

7.

Answering paragraph 7, these defendants admit the same and allege with respect thereto that said contract is a public document, equally available to all parties litigant in this action.

8.

Answering paragraph 8, these defendants admit the same except as hereinafter alleged.

9.

Answering paragraphs 9, 10, 11 and 12, these defendants deny the same.

10.

Answering paragraph 13, these defendants admit the sum of [11] \$32,614.66 was paid by these defendants to the use plaintiff, M. C. Schaefer, and further admit that there is owing to the use plaintiff an amount not in excess of \$1,449.88 by reason of use plaintiff's performance of the said subcontract, but these defendants deny that said amount is owing to the use plaintiff by these defendants except as hereinafter set forth in the cross-complaint of these defendants against the defendants A. J. Goerig and Clyde Philp, and further deny that these defendants agreed to pay interest on amounts coming due to the use plaintiff from these defendants.

11.

Answering paragraph 14, these defendants admit that no arbitration was ever had and no arbitration decision reached, but deny each and every other allegation thereof except as set forth in the affirmative defense of these defendants.

12.

Answering paragraph 15, these defendants admit the same.

13.

Answering paragraph 16, these defendants admit the receipt of the notice therein referred to, but deny the facts stated in said notice and further deny each and every other allegation of said paragraph 16.

14.

Answering paragraph 17, these defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in said paragraph contained, and therefore deny the same and demand proof thereof.

15.

Answering the Alternative Second Cause of Action of the amended complaint of the plaintiff, these defendants admit, deny and allege as follows:

1.

Answering paragraph 1 thereof, these defendants realleged paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 hereinbefore set forth.



2.

Answering paragraph 2, these defendants deny each and every allegation [12] in said paragraph contained and the whole thereof.

3.

Answering paragraph 3, these defendants reallege paragraphs 10, 11, 12, 13 and 14 hereinbefore set forth.

Further answering said amended complaint and as an Affirmative Defense thereto, these defendants allege:

1.

That under and by the terms of the subcontract referred to in the plaintiff's amended complaint, wherein the use plaintiff is the subcontractor and these defendants and their aforesaid joint adventurers are the principal contractor, it is provided in Article Three, Section 9, thereof as follows:

“Arbitration 9: Should any dispute arise between Owner or the Principal Contractor and the Subcontractor as to the interpretation of plans and specifications, amounts to be allowed for additions or deductions, or as to time of completion, or as to any other matter in connection with the performance of this agreement, the disputed question shall, in the first instance, be decided by the Principal Contractor. Should such decision not be satisfactory to the Subcontractor, the disputed question shall be referred

to and decided upon by two competent arbitrators, skilled and experienced, one to be selected by each party hereto, and in case these two cannot agree, they shall select a third, and the decisions of any two of the three arbitrators shall be binding upon all parties. The arbitrators shall assess the cost and expenses of such arbitration against either or both parties as they may determine. Written notice, from either party of intention to arbitrate, shall be given wherever possible, within thirty days after the occasion for such arbitration arises, and in no case shall the work be stopped pending arbitration. In case of notice of arbitration, each party shall appoint his arbitrator within two weeks after such notice, and these two arbitrators shall either settle the question or select another arbitrator and thus settle the question within thirty days thereafter.

“The above arbitration shall be a condition precedent to any suit or action instituted in any Court, provided however that if a final decision has not been reached by the arbitrators within sixty days after the first written request for arbitration, either party may thereupon, and at his option, bring suit on the matter in dispute. Wherever permitted by law such decision may be filed in court to carry the same into effect.”



2.

That this action and the issues material hereto constitute a dispute which has arisen between the said principal contractor and the said [13] subcontractor as to matters in connection with the performance of said subcontract.

3.

That the use plaintiff has as yet failed to comply with Article Three, Section 9, of said subcontract above set forth, and that arbitration in accordance therewith has not yet been had hereon.

For a cross-complaint against the use plaintiff, M. C. Schaefer, these defendants allege as follows:

1.

That during all times hereinafter mentioned, the defendants Sam Macri, Don Macri and Joe Macri have been and now are copartners doing business under the assumed name and style of Macri & Co., also known and being the same entity as Macri & Company, with principal place of business at Seattle, King County, Washington, and with all said partners being residents of said City, County and State.

2.

That during all times hereinafter mentioned, the use plaintiff, M. C. Schaefer, was a sole trader doing business under the assumed name and style of Concrete Construction Company, with his principal place of business and residence in Portland, Multnomah County, Oregon.

## 3.

That heretofore, on or about December 7, 1943, these defendants entered into a written contract with the United States of America, through the Bureau of Reclamation, Department of the Interior, numbered 12r-14825, for the earthwork, pipe lines and structures, laterals 59.3 to 69.8 and sub-laterals, Roza Division, Yakima Project, Washington, wherein and whereby the defendants contracted to furnish materials and perform work in accordance with the terms of said contract; that as required thereby defendants executed, as principal, with the Continental Casualty Company, a corporation, as surety, a good and sufficient written performance bond and payment bond; that said contract No. 12r-14825, with said Specifications No. 1062 and with the said performance bond and payment bond, is a [14] public document on file with the Department of the Interior, equally available to all parties litigant in this action. That said public document as so comprised was made available to and was inspected by the use plaintiff, M. C. Schaefer, prior to the execution of the subcontract next hereinafter described.

## 4.

That on or about March 14, 1944, in furtherance of and based upon the portion of the said contracted work under said principal contract, the use plaintiff, M. C. Schaefer, dealing as a sole trader under the name and style of Concrete Construction Company, entered into the subcontract referred to in para-

graph 8 of the amended complaint herein with the defendants. That under and by the terms of said subcontract the said M. C. Schaefer contracted

“to furnish all labor, and necessary equipment to do all the concrete work, formwork, cut, bend and install all reinforcing steel, all such work as shown on the Plans and as specified in the Specifications No. 1062 Contract No. 12r-14825, Roza Division, Yakima Project, Washington. Subcontractor shall strip and clean all concrete forms, remove nails from same and pile same in neat piles, after concrete has been poured in accordance with Plans, Specifications and Government Inspection and has had the proper time to set up. Forms at completion to be the property of the General Contractor.

“Time being the essence of this Contract the Subcontractor shall prosecute his work with a diligence and to the utmost of his ability and in a workmanlike manner.

“All materials except form wire, nails and curing material will be furnished by General Contractor or/and Owner. Subcontractor will furnish the above wire, nails and curing material.

“Subcontractor will pay to the General Contractor \$42.00 for power hookup and 90 per cent of light and power bill unless it is elected to make use of separate meter setups.”

## 5.

That the use plaintiff, M. C. Schaefer, at the time of the execution of the said subcontract on or about March 14, 1944, represented to and urged upon these defendants that the use plaintiff had adequate equipment with which to subcontract for the performance of the additional work under the proposal being made by the United States of America, Department of Interior, Bureau of Reclamation, for work to be performed under contract specifications which later became a part of Contract No. 12r-14996 with Specifications numbered 1068, including [15] the schedules, specifications and drawings for earthwork, pipe lines and structures, laterals 70.1 to 84.6 and sublaterals, East Turbine lateral, station 260+00 to the end, and sublaterals East Turbine lateral wasteway, and Diversion channels, Mile 51.74 to Mile 58.45, Roza Division, Yakima project, Washington; and the said use plaintiff, after the inspection in the field and the inspection of the said Specifications No. 1068 and the terms and conditions of the contract requirements for performance of the principal contract in connection with said Specifications No. 1068, represented to these defendants that said use plaintiff would perform the subcontracted work hereinafter more particularly specified, and that the said work would be conducted concurrently with the work being performed under aforesaid Specifications No. 1062 so that there would be no abatement of subcontract performance both under the aforesaid principal contract numbered 12r-14825 and under said pro-

posed contract numbered 12r-14996 if awarded to defendants. That as part of said representation the said use plaintiff, M. C. Schaefer, thereupon executed and delivered to these defendants form of subcontract under date of and executed April 21, 1944, and that by the terms of said subcontract the use plaintiff, M. C. Schaefer, specifically agreed

“to furnish all labor, and necessary equipment to do all the concrete work, formwork, structural timber work, cut, bend and install all reinforcing steel, all such work as shown on Plans and as specified in the Specifications No. 1068 Roza Division, Washington. Subcontractor shall clean all concrete forms, remove nails from same and pile same in neat piles. All forms and form lumber at completion of job shall remain the property of the General Contractor. All work shall be done in strict accordance with Plans, Specifications, Government Inspection and to the satisfaction of the General Contractor.

“All materials except form wire, nails and curing materials will be furnish by the General Contractor or/and Owner. Subcontractor will furnish the above wire, nails and curing materials.

“General Contractor will furnish only form lumber to the Subcontractor.

“Time being the essence of this Contract the Subcontractor shall prosecute his work with a diligence and to the utmost of his ability and in a workmanlike manner.”



## 6.

That thereupon, and relying on said subcontract undertaking and the said [16] oral undertaking by the said use plaintiff that there would be a continuity of performance work under both the aforesaid Specifications No. 1062 and said Specifications No. 1068, these defendants made bid for and were awarded the principal contract for performance of the work called for by said Specifications No. 1068, which said contract was entered into between the United States of America, Department of Interior, Bureau of Reclamation, as principal, and the defendants, as contractor, on and dated May 18, 1944, the said contract being numbered 12r-14996 and providing for the performance of the earthwork, pipe lines and structures, laterals 70.1 to 84.6 and sublaterals, East Turbine lateral, station 260+00 to the end, and sublaterals East Turbine lateral wasteway, and Diversion channels, Mile 51.74 to Mile 58.45, Roza Division, Yakima project, Washington, for the performance of the said contracted work according to the schedules, specifications and drawings under said Specifications No. 1068; that, as required thereby, defendants also executed as principal with the Continental Casualty Company, a corporation, as surety, good and sufficient written performance bond and payment bond; and that said contract, with the said Specifications No. 1068 and with the said performance bond and the said payment bond, is a public document on file with the Department of Interior, Bureau of Reclama-

tion, equally available to the use plaintiff and to the defendants and copies of which will be produced at time of trial of this suit. That said contract No. 12r-14996 provided that defendants might enter into subcontracts in carrying out the provisions thereof.

## 7.

That said subcontract on principal contract No. 12r-14996, Specifications No. 1068, entered into by and between these defendants and the use plaintiff, as aforesaid, provided that:

“Commence the work when directed by the Principal Contractor and thereafter prosecute it continuously and diligently to completion.

“Coordinate the work covered by this agreement with that of all other subcontractors and of the Owner and of the Principal Contractor. Use all reasonable means to avoid delay either in the work hereunder or in the work of others and cooperate with the Owner, the Principal Contractor and all other subcontractors to facilitate the completion of the entire work. The subcontractor shall be governed by such [17] orders as the Principal Contractor may give as to the time and sequence in which the component parts of the work shall be done. The Subcontractor shall not be entitled to any damages or additional compensation arising from, or because of any reasonable orders given or acts done by the Principal Contractor for the purpose of coordinating the work of all con-

tractors, subcontractors and material men. If the Subcontractor shall be delayed in the performance of the work as a result of such orders or acts, the Subcontractor shall be entitled to an extension of time equal to the delay so caused; provided, however, that written notice of the fact and cause of such delay be given by the Subcontractor to the Principal Contractor within five days after the occurrence of the cause of such delay and said extension of time shall be thereafter determined and allowed and specified in writing by the Principal Contractor. The Subcontractor shall assume full responsibility for and indemnify the Owner and the Principal Contractor against all loss, cost and expense which may result from Subcontractor's delaying the progress or completion of the entire work."

## 8.

That the principal contract between defendants and the United States of America, being contract No. 12r-14996, Specifications No. 1068, paragraph 21, page 12, provided that:

"The contractor shall begin work within thirty (30) calendar days after date of receipt of notice to proceed and shall complete all of the work within three hundred (300) calendar days from the date of receipt of such notice. Delays due to National Defense orders made effective subsequent to the date of the bid will be considered to be delays caused by sets of the Government. \* \* \*"



## 9.

That after completing the aforesaid respective contractual arrangements between defendants and the United States of America, Department of Interior, Bureau of Reclamation, defendants on or about the 28th day of June, 1944, commenced performance of the work called for by said contracts, respectively, and as part thereof directed the use plaintiff, M. C. Schaefer, to commence performance of the subcontracted work under the aforesaid contract No. 12r-14825, with the belief and full assurance that the said use plaintiff would perform in continuity and without break the subcontracted work under both that said contract and the other contract, No. 12r-14996. That, accordingly, these defendants on or about November 30, 1944, agreeable to the terms of the aforesaid subcontract of April 21, 1944, directed the use plaintiff, M. C. Schaefer, to commence performance of the work called for by said subcontract, such order having been given by letter of that date, the original [18] of which is in possession of said use plaintiff and a full, true and correct copy of which is hereunto attached, marked Exhibit "A," is now referred to and herein incorporated by reference as fully for all purposes as though here set forth at length.

## 10.

That the use plaintiff failed, neglected and refused to commence performance of said work provided for by said subcontract when directed to do

so by these defendants and failed to coordinate the work covered by said subcontract with the work of the other subcontractors and with the work of the defendants as principal contractor as required by the terms and provisions of said subcontract, and continued to fail, neglect and refuse to perform said work or any part thereof.

11.

That on the continuing failure of the use plaintiff, M. C. Schaefer, to commence and to carry on the performance of said subcontract of April 21, 1944, these defendants on or about January 3, 1945, notified said use plaintiff that defendants would take over and complete said subcontracted work, such notice having been made by letter dated January 3, 1945, the original of which is in possession of said use plaintiff and a full, true and correct copy of which is hereunto attached, marked Exhibit "B," is now referred to and herein incorporated by reference as fully for all purposes as though here set forth at length.

12.

That thereafter and on or about the 3rd day of January, 1945, these defendants did take over and commence performance of the work provided by the subcontract between these defendants and the use plaintiff; that on or about the 10th day of October, 1945, these defendants fully and completely performed the work required by said subcontract

between these defendants and the use plaintiff; and that these defendants have now fully performed all the work required by the principal contract between them and the United States Government, being contract No. 12r-14996, Specifications No. 1068.

## 13.

That these defendants and their agents, officers and all persons, firms [19] and corporations employed by these defendants as subcontractors other than the use plaintiff have fully kept and performed all the terms and conditions of their subcontract with the use plaintiff on their part to be kept and performed.

## 14.

That by reason of the failure of the use plaintiff to perform the work agreed to and provided for by the terms and conditions of said subcontract and by reason of his failure to coordinate the work covered by said subcontract with the work of the other subcontractors and with the work of these defendants as principal contractor, and by reason of his default under said subcontract and his breach thereof, these defendants herein suffered damages in the amount of \$40,000.00, which said damages and all of them are recoverable by these defendants under and pursuant to the terms of Article Three, paragraph 7, of the said subcontract between these defendants and the use plaintiff.

## 15.

That said subcontract provides:

“12: In any action brought by the Principal Contractors based upon this agreement or any part thereof, or as a result of any default in the performance of any of the terms or provisions thereof, the Subcontractor shall pay to the Principal Contractor an additional, reasonable amount as attorneys’ fees, whether the same proceed to be judgment or not, and this provision shall also apply to any suit on any bond furnished hereunder and to any action brought against the Owner’s property to foreclose any lien arising out of this agreement. Should the Principal Contractor fail to make payment in accordance with this agreement and the Subcontractor bring suit to enforce payment and secure judgment thereon, the Principal Contractor will pay, in addition to such judgment, a reasonable amount to be fixed by the Court as attorneys’ fees in connection with such suit.”

## 16.

That this is an action brought upon this agreement and as a result of a default of performance of the terms thereof by the use plaintiff; that by reason thereof these defendants are entitled to recover reasonable attorneys’ fees in this action; that \$3,500.00 is a reasonable amount to allow these defendants as attorneys’ fees herein. [20]

For a cross-complaint against the defendants, A. J. Goerig and Clyde Philp, these defendants allege as follows:

## 1.

That during all times hereinafter mentioned, Sam Macri, Don Macri and Joe Macri have been and now are copartners doing business under the firm name and style of Macri & Co., also known and being the same entity as Macri & Company, with principal place of business at Seattle, King County, Washington, all of said partners being residents of said City, County and State.

## 2.

That on or about December 11, 1943, these cross-complainants, Sam Macri, Don Macri and Joe Macri, copartners doing business as Macri & Co., as first party, entered into a written joint venture agreement with the defendant A. J. Goerig as second party and the defendant Clyde Philp as third party, under and by the terms of which the said defendants A. J. Goerig and Clyde Philp understood and agreed to assume and pay for the costs and charges of and to have the interests in the proceeds from performance of the principal contract described in paragraph 5 of the plaintiff's amended complaint and in the following paragraph hereof, upon the following basis:  $47\frac{2}{3}\%$  to these cross-complainants as first party, 20% to the defendant A. J. Goerig as second party, and  $32\frac{1}{3}\%$  to the defendant Clyde Philp as third party. That

a copy of the said written joint venture agreement is in the possession of the said defendants and demand for the production of said executed copy will be made herein, and when produced and filed will be incorporated as a part hereof by reference.

3.

That on or about December 7, 1943, the United States of America, acting by and through its Bureau of Reclamation, Department of the Interior, entered into a written contract with these cross-complainants, as copartners as aforesaid, and their aforesaid joint adventurers, said contract being designated No. 12r-14825, whereby these cross-complainants, as principal contractor under such co-partnership designation, agreed to perform the earthwork, pipe lines and structures, laterals [21] 59.3 to 69.8 and sublaterals, Roza Division, Yakima Project, Washington, based upon and governed by Specifications No. 1062, under and by the terms of which said contract these cross-complainants, acting as aforesaid, undertook and agreed to complete the worked called for thereby. That in all of the foregoing these cross-complainants acted for and on their own behalf and for and on behalf of their aforementioned joint adventurers, A. J. Goerig and Clyde Philp. That said contract No. 12r-14825, as above indicated, is a public document on file with the United States of America with aforesaid Bureau and Department, is equally available to all parties to this litigation, is required to



be produced and filed as a prerequisite to bringing this action by the use plaintiff, and when so filed and made available to the court is here incorporated by reference as an integral part hereof; and, further, that the work called for by said contract was in fact undertaken and completed by these cross-complainants.

## 4.

That, as required by the said contract No. 12r-14825, these cross-complainants, acting for the aforesaid copartnership and for their joint adventurers, executed as principal and the defendant Continental Casualty Company, a corporation, executed as surety the requisite payment and performance bonds as called for by said principal contract, the originals of which executed bonds are also filed with the United States of America with aforesaid Bureau and Department, are equally available to all parties to this litigation, are required to be produced and filed as a prerequisite to bringing this action by the use plaintiff, and when so filed and made available to the Court are here incorporated by reference as an integral part hereof.

## 5.

That under and by the terms of said joint venture agreement the defendants A. J. Goerig and Clyde Philp became indebted to and remain indebted to these cross-complainants, Sam Macri, Don Macri and Joe Macri, copartners as aforesaid, in amount greatly in excess of the total amount of \$1449.87

due the use plaintiff by reason of his performance of said subcontract, and in excess of the [22] total amount of \$61,364.44 and the interest thereon demanded by the use plaintiff in this action, by reason of the costs and charges borne and paid for by these cross-complainants in the performance of the principal contracts Nos. 12r-14825 and 12r-14996 hereinabove mentioned, over and above the share of the total costs and charges which said copartners were to pay under said joint venture agreement. That by reason of the foregoing, these cross-complainants are entitled to judgment against the said defendants A. J. Goerig and Clyde Philp, jointly and severally, in the amount of the use plaintiff's claim herein if the same is sustained, or in whatever amount is awarded the use plaintiff thereon.

## 6.

That on or about the 13th and 15th days of May, 1946, the United States of America, through its Department of Internal Revenue, caused to be served upon these defendants the notices of levy and notices of tax liens, copies of which are hereto attached and marked Exhibits "C" and "D", respectively, and warrants for distraint Nos. 46-3665, 46-3666, 46-9020, 46-0921, 46-0922, 46-0923, 46-4262, 46-4263, 46-4264 and 46-4265 against the use plaintiff, M. C. Schaefer, for unpaid taxes in the amount of \$10,224.95, due the United States of America, and that these defendants have concurrently made return on said levies consistent with the allegations



hereof. That by reason of said levies, the United States of America has a claim against said use plaintiff, prior to any which may be established by these defendants herein, which said claim of the United States of America being uncollectible, renders uncollectible and valueless any judgment these defendants may recover herein against the use plaintiff, M. C. Schaefer, on the cross-complaint of these defendants against said use plaintiff. That because of the foregoing, these defendants are entitled to judgment against the defendants A. J. Goerig and Clyde Philp imposing upon said defendants a share, as fixed by the aforesaid joint venture agreement, of the damages sustained by these defendants by reason of the default of the use plaintiff, M. C. Schaefer, as set forth in the said cross-complaint of these defendants against said use plaintiff and the insolvency and inability of said use plaintiff to satisfy a judgment in the amount to which [23] these defendants are entitled, or any amount whatsoever. And further, that the said indebtedness of the defendants A. J. Goerig and Clyde Philp to these cross-complainants, as above mentioned, exceeds the amount demanded by these cross-complainants of the use plaintiff, M. C. Schaefer, in the cross-complaint herein of these defendants against said use plaintiff, and by reason thereof these defendants are entitled to a judgment against defendants A. J. Goerig and Clyde Philp in the amount of the judgment awarded these defendants against the use plaintiff herein.

Wherefore, these defendants, Sam Macri, Don Macri and Joe Macri, copartners doing business as Macri & Co., pray judgment and relief as follows:

1. That the use plaintiff have and recover nothing against these defendants, and that the amended complaint herein be dismissed as to these defendants and that they have their costs and disbursements herein to be taxed.

2. That these defendants be awarded judgment against the use plaintiff, M. C. Schaefer, for the sum of \$40,000.00, together with interest thereon at the rate of six per cent per annum from the 3rd day of January, 1945, and for the further sum of \$3,500.00 attorneys' fees.

3. That based upon the cross-complaint herein against the defendants, A. J. Goerig and Clyde Philp, summons may now issue out of the above-entitled court directed to said defendants, A. J. Goerig and Clyde Philp, requiring the said defendants to appear and defend against the said cross-complaint within the time and in the manner required by law, and that judgment be awarded these defendants against the defendants A. J. Goerig and Clyde Philp, and each of them, jointly and severally, as follows:

(a) In an amount equal to the judgment, if any, awarded the use plaintiff in this action against these defendants, or, if such judgment be denied, that the amount of the judgment awarded the use plaintiff against these defend-

ants be apportioned also against the defendants A. J. Goerig and Clyde Philp to the extent and on the [24] basis specified in the joint venture agreement as above alleged in said cross-complaint herein.

(b) In the sum of \$40,000.00 or in whatever amount judgment herein is granted these defendants against the use plaintiff, or, in the event such judgment be denied, judgment against defendants A. J. Goerig and Clyde Philp in an amount equal to 20% and 32 $\frac{1}{3}$ %, respectively, of the amount of the judgment awarded these defendants on their cross-complaint against the use plaintiff herein.

4. That these defendants have such other and further relief as is just, the premises considered.

S. W. BRETHORST,  
TOM W. HOLMAN,  
THOMAS N. FOWLER,  
WARREN L. DEWAR,

Attorneys for Defendants and Cross-Complainants  
Sam Macri, Don Macri and Joe Macri.

United States of America,  
State of Washington, County of King—ss.

Sam Macri, being first duly sworn, upon his oath states:

That he is one of the defendants and cross-complainants in the above-entitled action and makes this verification on behalf of himself and Don

Macri and Joe Macri, his co-defendants and co-cross-complainants herein; that he has read the foregoing answer and cross-complaint, knows the contents thereof and believes the same to be true.

SAM MACRI.

Subscribed and sworn to before me this 6th day of June, 1946.

[Seal]                      A. T. BATEMAN,  
Notary Public in and for the State of Washington,  
residing at Seattle.

EXHIBIT "A"

November 30, 1944

Concrete Construction Co.  
1635 Southeast Eleventh Avenue  
Portland 14, Oregon

Attention: Mr. M. C. Schaeffer  
Gentlemen:

Re: Subcontract No. 1068, Roza Division, Washington; U. S. Reclamation Job Specification No. 1068.

With reference to the subcontract signed by you as subcontractor with Macri & Company as principal contractor, covering performance of a portion of the above contracted work and with reference also to the letter of September 18, 1944, from the United States Department of Interior, Bureau of Reclamation, to Macri & Company, a copy of which has been furnished to you, and with reference to

Section 8 of Article One of such subcontract, please note the following:

The undersigned as principal contractor under said United States Reclamation Job Specification No. 1068, Roza Division, Washington, laterals 701-801, etc., and diversion channels, hereby direct Concrete Construction Co. as subcontractor now to commence work on such principal contract and for the portion thereof covered by such subcontract.

A duplicate of this letter has been retained.

Very truly yours,

MACRI & COMPANY,

By /s/ SAM MACRI.

Registered Mail Return Receipt Requested.

EXHIBIT "B"

January 3, 1945

Concrete Construction Co.  
1635 Southeast Eleventh Avenue  
Portland 14, Oregon

Attention: Mr. M. C. Schaeffer  
Gentlemen:

Re: Subcontract No. 1068, Roza Division, Washington; U. S. Reclamation Job Specification No. 1068.

Pursuant to Section 8 of Article I and to Section 7 of Article II of your above designated subcontract

with us and because of your failure to commence work as ordered by our registered letter to you of November 30, 1944, re above subcontract number, you are advised that we hold you to be in default, and, accordingly, have taken over and will perform, at your cost, the subcontract work undertaken by you by such above numbered subcontract.

Very truly yours,

MACRI & COMPANY,

By /s/ SAM MACRI.

SM:GN

Registered—Return receipt requested.

#### EXHIBIT "C"

Lien No. 9023. Form 68-A. Treasury Department,  
Internal Revenue Service. Revised Oct. 1944.  
United States of America, ..... Collection  
District, State of Washington.

#### Notice of Levy

To Macri Company

Sam Macri, Don Macri, & Joe Macri -P-

At Seattle, Washington.

You are hereby notified that there is now due, owing, and unpaid from M. C. Schaefer, DBA Concrete Construction Co. to the United States of America the sum of Ten Thousand Two Hundred Twenty-four and 95/100 dollars (\$10,224.95) as and for an internal revenue tax.



You are further notified that all property, rights to property, moneys, credits, and/or bank deposits in your possession and belonging to the aforesaid M. C. Schaefer, DBA Concrete Construction Co. and all sums of money owing from you to the said M. C. Schaefer, DBA Concrete Construction Co. are hereby seized and levied upon for the payment of the aforesaid tax, together with penalties and interest, and demand is hereby made upon you for the sum of Ten Thousand Two Hundred Twenty-four and 95/100 dollars (\$10,224.95) of the amount now owing from you to the said M. C. Schaefer, DBA Concrete Construction Co. or for such lesser sum as you may be indebted to him, to be applied in payment of the said tax liability.

Dated at Tacoma, Washington, this 7th day of May, 1946.

[Seal]      RALPH A. NOERENBERG,    EJS  
Collector of Internal Revenue,  
Deputy Collector in Charge.

Form 668—Rev. Nov. 1943. Treasury Department, Internal Revenue Service. United States Internal Revenue, .....District of Washington, May 7, 1946.

No. 9023

#### Notice of Tax Lien(s) Under Internal Revenue Laws

Pursuant to the provisions of Sections 3670, 3671, and 3672 of the Internal Revenue Code of the United States, notice is hereby given that there have been assessed under the Internal Revenue laws of the United States against the following-named taxpayer, taxes (including interest and penalties) which after demand for payment thereof remain unpaid, and that by virtue of the above-mentioned statutes the amount (or amounts) of said taxes, together with penalties, interest, and costs that

may accrue in addition thereto, is (or are) a lien (or liens) in favor of the United States upon all property and rights to property belonging to said taxpayer, to wit:

Name of taxpayer M. C. Schaefer, DBA Concrete Construction Co.

Residence or place of business

Nature of Tax	Year or Taxable Period Ended	Date Assessment		Amount of Assessment
		List Received	List Signed	
Withholding Tax.....	Qtr. 6-30-45	8/20/45	I	\$ 10.00
Withholding Tax.....	Qtr. 6-30-45	7/16/45	T	1,713.60
			T	1,864.42
Withholding Tax.....	Qtr. 12-31-44	2/8/45	I	10.00
			T	3,230.03
Withholding Tax.....	Qtr. 3-31-45	5/24/45	I	10.00
		List Received	T	594.32
Employment Tax—FICA.....	Qtr. 3-31-45	5/18/45	I	1.07
			T	297.84
Employment Tax—FICA.....	Qtr. 6-30-45	10/1/45	I	2.22
			T	27.47
Employment Tax—FUTA.....	Year 1943	5/18/45	I	2.11
			T	261.13
Employment Tax—FUTA.....	Year 1944	5/21/45	I	4.52
Income Tax.....	Year 1943	8/28/45	T	560.42
Income Tax.....	Year 1944	7/10/45	T	564.94
		Filing Fee		.50
Total.....				\$9,154.59

RALPH A. NOERENBERG,  
Deputy Collector in Charge  
Collector.



Certificate of Officer Authorized by Law to Take Acknowledgments  
State of Washington,  
County of Pierce—ss.

Before me, this day personally appeared Ralph A. Noerenberg, to me  
well known and well known by me to be the person described in and who  
executed the foregoing instrument as Collector of Internal Revenue for  
the ..... Collection District of Washington; and he acknowledged  
before me that he executed the same as such Collector of Internal Revenue,  
and for the purpose herein expressed.

Witness my hand and official seal at Tacoma, Washington, in the  
County and State aforesaid, this 7th day of May, 1946.

2 copies—Clerk of United States District Court

To ..... Auditor of King County

[Seal] .....  
Notary Public

### EXHIBIT "D"

Lien No. 9023. Form 668-A. Treasury Depart-  
ment, Internal Revenue Service. Revised Oct.  
1944. United States of America, ..... Col-  
lection District, State of Washington.

### Notice of Levy

To Macri Company

Sam Macri, Don Macri, Joe Macri, A. J. Goerig,  
& Clyde Philp -P-

At Seattle, Washington

You are hereby notified that there is now due,  
owing, and unpaid from M. C. Schaefer, DBA Con-  
crete Construction Co. to the United States of  
America the sum of Ten Thousand Two Hundred  
Twenty-four and 95/100 dollars (\$10,224.95) as  
and for an internal revenue tax.

You are further notified that all property, rights to property, moneys, credits, and/or bank deposits now in your possession and belonging to the aforesaid M. C. Schaefer, DBA Concrete Construction Co. and all sums of money owing from you to the said M. C. Schaefer, DBA Concrete Construction Co. are hereby seized and levied upon for the payment of the aforesaid tax, together with penalties and interest, and demand is hereby made upon you for the sum of Ten Thousand Two Hundred Twenty-four and 95/100 dollars (\$10,224.95) of the amount now owing from you to the said M. C. Schaefer, DBA Concrete Construction Co. or for such lesser sum as you may be indebted to him, to be applied in payment of the said tax liability.

Dated at Tacoma, Washington, this 7th day of May, 1946.

[Seal]      RALPH A. NOERENBERG, EJS  
Collector of Internal Revenue,  
Deputy Collector in Charge.

Form 668—Rev. Nov. 1943. Treasury Department. United States Internal Revenue, .....District of Washington, May 7, 1946.

Notice of Tax Lien(s) Under Internal Revenue Laws

Pursuant to the provisions of Sections 3670, 3671, and 3672 of the Internal Revenue Code of the United States, notice is hereby given that there have been assessed under the Internal Revenue laws of the United States against the following-named taxpayer, taxes (including interest and penalties) which after demand for payment thereof remain unpaid, and that by virtue of the above-mentioned statutes the amount (or amounts) of said taxes, together with penalties, interest, and costs that

may accrue in addition thereto, is (or are) a lien (or liens) in favor of the United States upon all property and rights to property belonging to said taxpayer, to wit:

Name of taxpayer M. C. Schaefer, DBA Concrete Construction Co.

Residence or place of business

Nature of Tax	Year or Taxable Period Ended	Date Assessment		Amount of Assessment
		List Received	List Signed	
Withholding Tax.....	Qtr. 6-30-45	8/20/45	I	\$ 10.00
Withholding Tax.....	Qtr. 6-30-45	7/16/45	T	1,713.60
			T	1,864.42
Withholding Tax.....	Qtr. 12-31-44	2/8/45	I	10.00
			T	3,230.03
Withholding Tax.....	Qtr. 3-31-45	5/24/45	I	10.00
		List Received	T	594.32
Employment Tax—FICA.....	Qtr. 3-31-45	5/18/45	I	1.07
			T	297.84
Employment Tax—FICA.....	Qtr. 6-30-45	10/1/45	I	2.22
			T	27.47
Employment Tax—FUTA.....	Year 1943	5/18/45	I	2.11
			T	261.13
Employment Tax—FUTA.....	Year 1944	5/21/45	I	4.52
Income Tax.....	Year 1943	8/28/45	T	560.42
Income Tax.....	Year 1944	7/10/45	T	564.94
		Filing Fee		.50
Total.....				\$9,154.59

RALPH A. NOERENBERG,  
Deputy Collector in Charge  
Collector.

Certificate of Officer Authorized by Law to Take Acknowledgments  
State of Washington,  
County of Pierce—ss.

Before me, this day personally appeared Ralph A. Noerenberg, to me well known and well known by me to be the person described in and who executed the foregoing instrument as Collector of Internal Revenue for the ..... Collection District of Washington; and he acknowledged before me that he executed the same as such Collector of Internal Revenue, and for the purpose herein expressed.

Witness my hand and official seal at Tacoma, Washington, in the County and State aforesaid, this 7th day of May, 1946.

2 copies—Clerk of United States District Court

To Auditor of King County

[Seal] .....  
Notary Public

[Endorsed]: Filed June 7, 1946.

---

[Title of District Court and Cause.]

### ANSWER

Come now A. J. Goerig and Clyde Philp, two of the above named defendants, and for answer to plaintiff's complaint, admit, deny and allege as follows:

1.

For answer to paragraph 1 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

2.

For answer to paragraph 2 of plaintiff's complaint these answering defendants deny each and

every allegation therein contained and particularly deny that these answering defendants were associated with Sam Macri, Don Macri or Joe Macri as co-partners or otherwise. These answering defendants allege that any relationship between these answering defendants and any of said other defendants named was terminated prior to the incurring of the liability, if any, alleged in plaintiff's complaint.

3.

For answer to paragraph 3 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

4.

For answer to paragraph 4 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

5.

For answer to paragraph 5 of plaintiff's complaint these answering defendants deny each and every allegation therein contained. [32]

6.

For answer to paragraph 6 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

7.

For answer to paragraph 7 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

8.

For answer to paragraph 8 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

9.

For answer to paragraph 9 of plaintiff's complaint these answering defendants deny each and every allegation therein contained.

Wherefore, these answering defendants having fully answered plaintiff's complaint pray that the same be dismissed with prejudice and that these answering defendants be granted judgment against the plaintiff for their costs and disbursements taxable by law.

NAT U. BROWN,

KENNETH C. HAWKINS,

Attorneys for defendants, A. J. Goerig and Clyde Philp.

Service accepted and copy received of the foregoing Answer this 27th day of March, 1946.

HARRY L. OLSON,

FRED C. PALMER,

Attorneys for Plaintiff.

[Endorsed]: Filed July 2, 1946. [33]

[Title of District Court and Cause.]

### CROSS-COMPLAINT

Comes now the defendants Clyde Philp and A. J. Goerig and for a cross-complaint against Sam Macri, Joe Macri and Don Macri, admit, deny and allege as follows:

1.

These answering defendants and Sam Macri, Joe Macri and Don Macri, three of the above named defendants, heretofore entered into an agreement absolving these answering defendants of any liability alleged in plaintiff's complaint on file herein.

2.

In the event judgment be entered against these answering defendants, these answering defendants by virtue of said agreement are entitled to judgment over and against Sam Macri, Joe Macri and Don Macri in the amount of such judgment.

Wherefore, these answering defendants pray that in the event judgment be entered against these answering defendants in favor of the plaintiff that they be given judgment over and against Sam Macri, Joe Macri and Don Macri in the amount of such judgment, together with these answering de-



fendants' costs and disbursements taxable by law.

NAT U. BROWN,  
KENNETH C. HAWKINS,  
Attorneys for defendants  
Clyde Philp and  
A. J. Goerig

Service accepted and copy received of the foregoing cross-complaint this 28th day of March, 1946.

BRETHORST, HOLMAN,  
FOWLER & DEWAR,  
S. W. BRETHORST,  
TOM W. HOLMAN,  
THOMAS N. FOWLER,  
WARREN L. DEWAR

[Endorsed]: Filed July 2, 1946. [35]

---

[Title of District Court and Cause.]

### BILL OF PARTICULARS

Come now the defendants, A. J. Goerig and Clyde Philp, and in compliance to the Motion to Make More Definite and Certain, furnish the following information:

1.

The agreement alleged in paragraph 1 of these defendant's cross-complaint was in writing, and a copy thereof is attached hereto.



## 2.

An accounting between these defendants and the defendants, Sam Macri, Don Macri and Joe Macri, shows or will show a substantial amount in favor of these defendants, A. J. Goerig and Clyde Philp, over and above the amount claimed in this case and in any other litigation in which these individuals are parties.

## 3.

In accordance with the terms of said agreement, and in view of the fact that the balance in accounting between the parties is in favor of A. J. Goerig and Clyde Philp in excess of the amounts claimed in this litigation and all other litigations in which these individuals are parties, the claims of the plaintiff in this case are collectible solely from defendants, Sam Macri, Don Macri and [36] Joe Macri, and as alleged in these defendants' cross-complaint these defendants are absolved from any liability, if any, as alleged in use plaintiff's complaint on file herein.

NAT U. BROWN,  
KENNETH C. HAWKINS,  
Attorney for defendants A. J.  
Goerig and Clyde Philp.

## Agreement Terminating Joint Venture

By Virtue of This Agreement, made and entered into on July 15, 1944, by and between Macri & Company, a co-partnership, herein referred to as First Party, and A. J. Goerig and Clyde Philp, individually and constituting a co-partnership as Goerig & Philp or A. J. Goerig Construction Co., herein referred to as Second Parties,

Witnesseth:

The parties hereto heretofore and on or about December 11, 1943, entered into each of the several joint venture agreements in relation to the following operations:

- (1) A corporation as formed under the name and style of Macri Development Company, for the purpose and intention of developing Real Estate and building, 194 Federal Housing Administration dwelling units, as per plans and specifications, between 135th Street South and 140th Street South, near the Pacific Highway south of Seattle in King County, Washington.
- (2) Contract No. 2912, construction on Secondary State Highway No. 1-S, Johnson & Jim Creek Bridges, Cowlitz County, Washington.
- (3) Contract No. 12r-14825, Spec. 1062, earthwork, pipelines and structures, Laterals 69.3 to 69.8 and sub-laterals and Diversion Channels. Roza Division, Yakima Project, Washington.

- (4) Earthwork, pipelines and structures, Laterals 70.1 to 80.1 and sublateral, East Turbine Laterals Sta. 260-00 to end and Sublaterals East Turbine Lateral Wasteway and Diversion Channels, Mile 51.74 to Mile 58.45, Roza Division, Yakima Project, Washington.
- (5) The work to be done on Project 9536, Contract W7412-eng-1, duPongRPG-4344 being constructed at Richland, Washington, being known as the Sewer and Watermain Facilities Richland, Sub-contract No. 4, Richland, Washington, as it now exists.

That the parties hereto are desirous of terminating, cancelling and nullifying each of said joint venture agreements in relation to each of said operations, and now in consideration of the mutual engagements on the part of each of the parties hereto herein contained, and in further consideration of the mutual engagements on the part of each of the parties hereto herein contained, and in further consideration of the sum of Ten Dollars (\$10.00) in hand paid by each of the parties hereto, one unto the other, it is now agreed that each of said joint venture agreements between the parties hereto in relation to each of said projects above described, (1), (2), (3), (4), and (5), are hereby and now mutually cancelled, terminated and ended as though they had never been entered into, saving unto the parties, however, the duties, obligations, liabilities and responsibilities as hereinafter set forth.

(1) It is understood that in reference to the first four contracts or projects referred to hereinbefore, the contracts with the owners were entered into by first party and that second parties did not appear therein excepting as to the first project, this was a corporation formulated to carry on a building operation and second parties have advanced certain money in connection with said enterprise, credit for which second parties shall receive. Each of the said first four projects first party shall complete and perform as expeditiously as possible and as required by their contract obligations, and in event first party sustains financial loss in respect to the performance of any of said projects or contracts, then when said loss is ascertained and determined, second parties will pay to first party on each of said projects upon which a loss may result  $52\frac{1}{3}\%$  thereof. In determining the amount, if any, which second parties shall pay to first party, each of said projects shall be treated separately and profit, if any, realized by first party on one or some of said projects shall not be taken into consideration as to any loss that may be sustained upon any of the others. In this respect, in order to ascertain profit and loss, each transaction shall be considered entirely separate.

(2) As to Project (5), this contract with the owner was entered into by second parties directly with the owner, and first party does not appear therein, and second parties shall proceed with the performance of the same as though no joint venture agreement had ever been entered into in respect thereto, and second parties shall be entitled to re-

ceive all profits that may come, arise or grow in connection therewith, and shall themselves bear and pay any and all losses that may occur and shall save first party harmless from any legal liability or responsibility whatsoever in connection with the completion and performance of the same. [39]

(3) Second parties shall pay to first party, as soon as the amount is ascertained, the equipment rentals for first party's two-hoe shovels on the basis of the rental agreement regarding the same heretofore used, and now being used by second parties upon Project (5), as aforesaid, and will likewise pay for the repairs that are required upon first party's Lorraine Shovel use, as being used by second parties on said Project (5).

(4) In determining whether any loss on any of said projects results to first party, it is agreed that no rental on any of first party's equipment furnished and used on any of the same shall be charged, and it is further agreed that second parties are to charge no equipment rental against first party on Project (1), known and designated as "Val Vue Real Estate Development."

(5) It is understood that in the settlement and adjustment now being made between the parties in respect to said joint ventures, second parties will transfer to first parties all of the corporate stock in Macri Development Company, a corporation, that has or in reference to which it may become necessary to issue to second parties or either of them, and that second parties shall receive a credit therefor from first parties of \$37,500.00. That second



parties upon Project (5) are to receive or be credited with, as between the parties, the sum of \$56,604.00, and the difference between said sums of \$37,500.00 and \$56,604.00, or the sum of \$19,104.00, is now acknowledged as having been paid by second parties to first party concurrently with the execution and delivery of these presents.

(6) It is further agreed and understood that there are other joint ventures between the parties hereto that are not mentioned herein, some of which have been completed, but in connection with which final payments have not been received by the owners, some of which are in the process of construction looking toward completion. That in respect to none of these shall the relationship of the parties in any respect be changed by this agreement, and that their relationship as joint venturers is only concluded in respect to those hereinbefore specifically described and mentioned and that their relationship in respect only to those are hereby terminated and ended and as herein specified. [40]

(7) It is further agreed that certain funds of a joint venture between the parties hereto, commonly referred to as Stadium Homes, a housing project being constructed in Seattle, Washington, have been diverted to some or all of the first four projects or operations as hereinbefore described. First parties now agree to forthwith and immediately cause said diverted funds to be returned to the bank account of the Stadium Homes joint venture, in which all of the parties hereto are jointly interested, and not allow any subsequent diversion or diversions of the

funds of that joint venture in aid or in assistance of any of first party's subsequent operations, without second parties' written consent.

(8) It is further understood and agreed that this arrangement as hereinbefore specified between the parties is done and accomplished in a spirit of cooperation and friendship between all the parties hereto, and that either of the parties hereto will, if called upon by the other parties, give and render every possible assistance, one unto the other, in the completion of any or all of said projects. If the rendition of such cooperation and assistance by one party unto the other in this respect involves financial expenditures subsequent hereto, reimbursement by one party unto the other shall be determined and settled when the assistance is sought or obtained.

(9) In connection with the completion of the organization of Macri Development Company, a corporation, and the preparation of its books, records, and the issuance of its corporate stock, and particularly by Clyde Philp, one of the second parties, who has been elected secretary of said corporation and has performed duties in that capacity, each of second parties shall sign any and all additional papers or documents as and when their signatures are required, in order to expedite and complete all of the business affairs of said corporation and enable it to arrange its books of account, corporate records, and financial set-up along the lines as originally agreed upon between the parties. It is understood, however, that Clyde Philp, concurrently with the execution of these presents, is resigning as secretary of said corporation, but agrees to continue to act as such



until the acceptance of his resignation by the Board of Directors of said corporation has been accomplished.

In Witness Whereof the parties hereto have caused these presents to be executed and delivered the day and date first above written.

MACRI & COMPANY,

By DON MACRI,

One of Said Firm, But Authorized to Act in This Matter for It,

First Party.

CLYDE PHILP,

A. J. GOERIG,

Individually and d/b/a Goerig & Philp and/or A. J. Goerig Construction Co.,

Second Parties.

[Endorsed]: Filed July 5, 1946. [42]

---

[Title of District Court and Cause.]

REPLY TO ANSWER AND CROSS-COMPLAINT OF SAM MACRI, DON MACRI, AND JOE MACRI

Come now A. J. Goerig and Clyde Philp for reply to the answer and cross-complaint of Sam Macri, Don Macri and Joe Macri, admit, deny and allege as follows:

1.

For reply to paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of said defendants' answer these

replying defendants deny each and every allegation therein contained except as specifically admitted in these replying defendants' answer and cross-complaint.

## 2.

For reply to paragraphs 1, 2 and 3 of said defendants' answer to the alternative second cause of action of the amended complaint of the use plaintiff these replying defendants deny each and every allegation therein contained, except as specifically averred in these replying defendants' answer and cross-complaint.

## 3.

For reply to paragraphs 1, 2 and 3 of said defendants' affirmative defense these replying defendants deny each and every allegation therein contained, except as specifically averred in these replying defendants' answer and cross-complaint.

## 4.

For reply to paragraphs 1, 2, 3, 4, 5 and 6 of the cross-complaint against defendants A. J. Goerig and Clyde Philp these replying defendants deny each and every allegation therein contained and particularly deny the allegations of paragraph 2 and aver that said joint venture agreement referred to therein was terminated long prior to the incurrence of the liability referred to in plaintiff's complaint, and particularly deny the allegations of paragraph 5 and allege that pursuant to said agreement and the agreement terminating the same, said defendants

A. J. Goerig and Clyde Philp were absolved of all liability. That an accounting between these replying defendants and said defendants Sam Macri, Don Macri, and Joe Macri, will show that said defendants are indebted to these replying defendants in an amount substantially in excess of the amounts claimed in these proceedings.

Wherefore, these replying defendants pray that the answer and cross-complaint of the defendants, Sam Macri, Don Macri and Joe Macri be dismissed and that these replying defendants go hence with their costs. These replying defendants further pray that the defendants, Sam Macri, Don Macri, and Joe Macri, account to these replying defendants and to the court and furnish an accounting and that the court find that the said defendants are indebted to these replying defendants in an amount substantially in excess of the amounts claimed in these proceedings, and that upon such finding further find that these replying defendants are absolved of any and all liability.

NAT. U. BROWN,

KENNETH C. HAWKINS,

Attorneys for Defendants, A. J. Goerig and Clyde Philp.

[Endorsed]: Filed July 5, 1946. [44]

[Title of District Court and Cause.]

ANSWER OF CONTINENTAL CASUALTY  
COMPANY

Comes now the defendant Continental Casualty Company above named, a corporation, and answering the first cause of action of the complaint of the plaintiff, admits, denies and alleges as follows:

1.

Answering paragraphs 1 and 2 thereof, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in said paragraphs contained and, therefore, denies the same and demands proof thereof.

2.

Answering paragraph 3, this defendant admits that the defendants Sam Macri, Don Macri and Joe Macri are copartners doing business as the Macri Company. This defendant alleges that the defendants A. J. Goerig and Clyde Philp were joint adventurers with the defendants doing business as Macri Company with respect to the matters herein material.

3.

Answering paragraph 4, this defendant admits said paragraph.

4.

Answering paragraph 5, this defendant denies said paragraph.

5.

Answering paragraph 6, this defendant admits that it, together with said Macri Company as principal and it is surety, furnished a good [45] and sufficient written bond as required by a certain written contract described in paragraph 5, which bond is a public document in possession of the United States of America and is equally available to all parties litigant in this action, and that save and except as shown and stated by said original and executed bond this answering defendant denies each and every allegation, statement and thing contained in paragraph 6.

6.

Answering paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17, this defendant denies each and every allegation in said paragraphs contained.

### Second Cause of Action

1.

Answering paragraph 1 of the second cause of action, this defendant adopts the same answers made in the first cause of action to the paragraphs therein referred to and makes the same a part hereof.

2.

Answering paragraphs 2 and 3 of the second cause of action, this defendant denies each and every allegation in said paragraphs contained.

## First Affirmative Defense

Further answering said Amended Complaint and by way of first affirmative defense thereto, this defendant, Continental Casualty Company, alleges that in the application made for its bond, referred to in plaintiff's complaint, the defendants Macri, doing business as Macri Company, specifically undertook and agreed in their written application to save harmless and indemnify the Continental Casualty Company against any and all loss, liability and cost on its bond and that in the event that a judgment is entered in favor of the plaintiff herein against this defendant that this defendant should be subrogated to all rights of the plaintiff in said judgment against each of the defendants, other than this answering defendant. [46]

Wherefore, having fully answered plaintiff's complaint, this defendant prays that the same be dismissed and that it have and recover its costs herein incurred, and further prays that in the event a judgment is entered in favor of plaintiff and against this defendant that this defendant be subrogated to all rights of the plaintiff in said judgment against each of the other defendants, and that this defendant have a judgment against each of the other defendants for the full amount of said judgment and for all costs expended herein, including its reasonable attorney's fees, and that this defendant have such other and further relief as to the court may seem meet and proper.

/s/ EUGENE D. IVY,

Attorney for Defendant, Continental Casualty  
Company.



State of Washington,  
County of Yakima—ss.

Eugene D. Ivy, being first duly sworn, on oath deposes and says:

That he is the attorney for the defendant Continental Casualty Company above named; that he has read the above and foregoing Answer of Continental Casualty Company, knows the contents thereof, and believes the same to be true; that he makes this verification for and on behalf of the said defendant, being authorized so to do, and that no officer of said defendant is present in Yakima County.

/s/ EUGENE D. IVY.

Subscribed and sworn to before me this 16th day of July, 1946.

[Seal]                      JOHN GAVIN,  
Notary Public in and for the State of Washington,  
Residing at Yakima.

[Endorsed]: Filed July 25, 1946. [47]

---

[Title of District Court and Cause.]

ANSWER TO CROSS-COMPLAINT OF DEFENDANTS CLYDE PHILP AND A. J. GOERIG

Come Now the defendants Sam Macri, Joe Macri and Don Macri and answering the cross-complaint of the defendants Clyde Philp and A. J. Goerig, deny each and every allegation therein contained and the whole thereof.

Wherefore, having fully answered, these defendants pray for judgment dismissing said cross-com-



plaint, and further for judgment as prayed for in the answer and cross-complaint of these defendants on file herein.

BRETHORST, HOLMAN,  
FOWLER & DEWAR,  
TOM W. HOLMAN,  
S. W. BRETHORST,  
THOMAS N. FOWLER,  
WARREN L. DEWAR,

Attorneys for Defendants Sam Macri, Joe Macri  
and Don Macri.

United States of America,  
State of Washington,  
County of King—ss.

Sam Macri, being first duly sworn, upon his oath states: That he is one of the defendants in the above-entitled action and makes this verification for himself and on behalf of his co-defendants Joe Macri and Don Macri; that he has read the foregoing answer to cross-complaint, knows the contents thereof and believes the same to be true.

SAM MACRI.

Subscribed and sworn to before me this 17th day  
of September, 1946.

A. T. BATEMAN,

Notary Public in and for the State of Washington,  
Residing at Seattle.

Copy Received Sept. 21, 1946.

NAT U. BROWN,

Of Attys. for Goerig & Philp.

[Endorsed]: Filed Sept. 24, 1946. [48]

[Title of District Court and Cause.]

AMENDED REPLY AND CROSS-COMPLAINT  
TO CROSS-COMPLAINT OF DEFEND-  
ANTS MACRI

Comes now the plaintiff and replying to the answer and cross-complaint of the defendants, Sam Macri, Don Macri and Joe Macri against the plaintiff, admit, deny and allege as follows:

1.

For reply to paragraphs 1, 2, 3 and 4 of said defendants' cross-complaint, plaintiff admits the same, except that plaintiff denies the last sentence of paragraph 3.

2.

For reply to paragraph 5 of defendants' said cross-complaint plaintiff admits that he had adequate equipment with which to subcontract for the performance of the additional work therein referred to; that said work was to be conducted concurrently with the work to be performed under specifications 1062 and that the subcontract dated April 21, 1944, was executed, and except as so admitted plaintiff denies each and every other matter and fact in said paragraph contained.

3.

For reply to paragraph 6 of defendants' said cross-complaint plaintiff admits that the contract dated May 18, 1944, in said paragraph referred to

was executed and that the performance bond and payment bond therein referred to was [49] executed, and except as so admitted plaintiff denies each and every other allegation in said paragraph contained.

4.

For reply to paragraphs 7 and 8 of defendants' said cross-complaint the plaintiff admits the same except insofar as the original of said contract may differ from the quotations in said paragraphs contained.

5.

For reply to paragraph 9 of said defendants' cross-complaint plaintiff admits that it received the letter referred to as Exhibit "A" and except as so admitted denies each and every other allegation in said paragraph contained.

6.

For reply to paragraph 10 of said defendants' cross-complaint plaintiff denies the same and all thereof.

7.

For reply to paragraph 11 of said defendants' cross-complaint plaintiff admits the receipt of the letter referred to as Exhibit "B" and except as so admitted, denies every other allegation in said paragraph contained.

8.

For reply to paragraph 12 of said defendants' cross complaint plaintiff admits that the said de-

fendants unlawfully took over the performance of the work provided for in the subcontract and said cross-complaint referred to without tendering performance of said contract in accordance with said subcontract to the plaintiff, and except as so admitted denies each and every other allegation in said paragraph contained.

## 9.

For reply to paragraphs 13 and 14 of said defendants' cross-complaint said plaintiff denies the same and all thereof.

## 10.

For reply to paragraph 15 of said defendants' cross-complaint plaintiff admits the same except as to any inaccuracies as may be shown by comparison with the originals of said subcontract. [50]

## 11.

For reply to paragraph 16 of said defendants' said cross-complaint plaintiff denies the same and all thereof.

## 12.

Said plaintiff generally denies all of the allegations of said answer and cross-complaint that are inconsistent with or contrary to the allegations of plaintiff's complaint.

Further Replying to the said answer and cross-complaint of the said defendants as to the plaintiff, plaintiff alleges:

## 1.

That under and by virtue of the contracts referred to in the cross-complaint of said defendants Macri and as a condition precedent to the performance of the work and the furnishing of materials by the plaintiff Schaefer, the defendants Macri were to do and perform all excavating work for the installation and placing of the concrete work and to furnish the form lumber therefor. That notwithstanding their said contract obligation with reference to said excavation work and the furnishing of said form lumber, the said defendants Macri wholly failed and refused to perform said excavation work or to furnish said form lumber or to in any particular perform their part of said contract or tender performance thereof to enable the plaintiff Schaefer to proceed with the performance on his part of his part of said subcontract; that the said plaintiff Schaefer at all times stood ready, able and willing to perform his part of the said subcontract upon the performance by the defendants Macri of their part of said contract necessary and required to be performed by them as the condition precedent to the commencement of work by the plaintiff Schaefer; that notwithstanding said fact and without ever tendering plaintiff performance on the part of said defendants Macri of their part of said contract, the said defendants Macri without just cause or excuse thereof and in violation of their said contract unlawfully took over the work called for in said subcontract to the exclusion of the plaintiff.

Further replying to said answer and cross-complaint of said defendants as to this plaintiff and by way of cross-complaint thereto pursuant to [51] stipulation of all parties at pretrial hearing, plaintiff alleges:

1.

That M. C. Schaefer is an individual doing business as Concrete Construction Company, is the sole owner of said business and a resident of the State of Oregon.

2.

That Sam Macri, Don Macri, Joe Macri, A. J. Goerig and Clyde Philp are individuals and insofar as all matters herein referred to and material hereto are concerned, were co-partners doing business under the assumed name of "Macri Company" and "Macri & Company", are all residents of King County in the Western District of the State of Washington, and said defendants are herein referred to collectively as "Macri Company".

3.

That heretofore and on or about the 18th of May, 1944, the defendants entered into a written contract with the United States of America acting by and through its Department of the Interior, Bureau of Reclamation, said contract being contract No. 12r-14996, specifications numbered 1068, for the performance of earthwork, pipe lines, and structural laterals and sub-laterals, Roza Division, Yakima Project, Washington, according to the terms



and specifications in said contract contained and provided, and particularly in accordance with said Specifications No. 1068, a copy of which contract is in the possession of the defendants.

## 4.

That thereafter and on or about the 21st day of April, 1944, the defendants Macri Company, writing their name "Macri & Company" entered into a sub-contract in writing with the plaintiff wherein and whereby said Macri Company subcontracted to said Concrete Construction Company, and said Concrete Construction Company agreed to do the following:

"To furnish all labor, and necessary equipment to do all the concrete work, formwork, structural timber work, cut, bend and install all reinforcing steel, all such work as shown on Plans and as specified in the Specifications No. 1068 Roza Division, Washington. Subcontractor shall clean all concrete forms, remove nails from same and pile same in neat piles. All forms and form lumber at completion of job shall remain the [52] property of the General Contractor. All work shall be done in strict accordance with Plans, Specifications, Government Inspection and to the satisfaction of the General Contractor.

"All materials except form wire, nails and curing materials will be furnished by the General Contractor or/and Owner. Subcontractor will furnish the above wire, nails and curing materials.



“General Contractor will furnish only form lumber to the Subcontractor.”

a copy of said contract being in the possession of the defendants.

5.

That under and by virtue of said contracts and as a condition precedent to the performance of the work and the furnishing of materials by the plaintiff, the defendant was to do and perform all excavating work for the installation and placing of said concrete work and to furnish the form lumber therefor; that notwithstanding their contract obligation with reference to said excavation work and furnishing of said lumber, the defendants wholly failed, neglected and refused to perform said excavating work or to furnish said form lumber or to in any particular perform their part of said contract or tender performance thereof to enable the plaintiff to proceed with the performance on his part of said subcontract; that said plaintiff at all times stood ready, willing and able to perform his part of said subcontract upon the performance by the defendants of their part of said contract necessary and required to be performed by them as a condition precedent to the commencement of work by the plaintiff; that notwithstanding said fact and without ever tendering plaintiff performance on the part of said defendants of their part of said contract, the said defendants without just cause or excuse therefor and in violation of their said contract had the work called for in said contract performed by third parties.

## 6.

That prior to the execution of said subcontract hereinabove referred to the United States of America through the Department of Interior and the defendants Macri Company made and entered into a certain contract being Contract No. 124-14825 for earthwork, pipelines and structures, laterals 59.3 to 69.8 and sub-laterals Roza Division Yakima Project, Washington, which said contract called [53] for the performance of work similar to and of the same general type and quality as called for in Contract No. 12r-14996 above referred to, and that pursuant to said Contract No. 12r-14825 the parties hereto entered into a subcontract on or about the 14th day of March, 1944, wherein and whereby the defendants Macri & Company subcontracted to the plaintiff work of the same general type and character as that covered by the subcontract entered into between the parties hereto under date of April 21, 1944, hereinabove referred to, copies of all of which contracts are within the possession of the defendants; that in entering into said subcontract of April 21, 1944, it was within the contemplation of the parties that the plaintiff and his equipment had already been located on the ground at the Roza Project for use in the performance of both said contracts by the plaintiff.

## 7.

That the reason of the defendants said breach of their said subcontract of April 21, 1944, and by reason of the said defendants failure to permit the

plaintiff to perform said subcontract, said plaintiff deprived of the profits which would have been realized by the plaintiff from the performance of said contract over and above all costs and expenses of performing said contract, said loss of profits being in the amount of not less than \$5,000.00.

## 8.

That said contract provides, among other things as follows:

“Should the principal contractor fail to make payment in accordance with this agreement and the subcontractor bring suit to enforce payment and secure judgment thereon, the principal contractor will pay, in addition to such judgment, a reasonable amount to be fixed by the court as attorneys’ fees in connection with such suit.”

## 9.

That the ground upon which the jurisdiction of this court is invoked is that there is a diversity of citizenship between the plaintiff and the defendants, in that the plaintiff is a resident of the State of Oregon and the defendants are residents of the State of Washington and that the amount in controversy exceeds the sum of \$3,000.00. [54]

Wherefore having fully replied to the answer and cross-complaint of the defendants, Sam Macri, Don Macri, plaintiff prays that said defendants’ cross-complaint be dismissed with prejudice and that said

defendants take nothing thereby and that the plaintiff have and recover judgment as prayed for in his complaint, and in addition thereto that plaintiff have and recover judgment against the defendants Sam Macri, Don Macri and Joe Macri on plaintiff's cross-complaint herein in the sum of \$5000.00, together with plaintiff's costs and disbursements herein to be taxed and including plaintiff's reasonable attorney's fees to be taxed by the court in such sum as shall be deemed reasonable.

HARRY L. OLSON,

FRED C. PALMER,

Attorneys for Plaintiff.

Service accepted and copy received of the foregoing Amended Reply and Cross-Complaint to Cross-Complaint of Defendants Macri this 18th day of January, 1947.

BROWN & HAWKINS,

Attorneys for A. J. Goerig &  
Clyde Philp.

EUGENE D. IVY,

Attorney for Continental Casualty Company.

[Endorsed]: Filed Jan. 18, 1947. [55]

[Title of District Court and Cause.]

### ORDER ON PRE-TRIAL

Pursuant to an order for pre-trial under Rule 16 of the Rules of Civil Procedure for the District Courts, this cause came on for hearing on the 7th day of January, 1947.

Harry Olson and Fred C. Palmer appearing as attorneys for the plaintiff;

Thomas Holman and A. T. Bateman appearing as attorneys for defendants Macri;

Nat U. Brown appearing as attorney for defendants Goerig and Philp;

Eugene D. Ivy appearing as attorney for defendant Continental Casualty Company.

It is stipulated that any party to this cause may offer in evidence any of the documents marked for identification in cause #267 and the documents marked for identification in this cause without objection as to genuineness of signatures and authenticity of such documents.

Plaintiff's Identification "1"—Subcontract on Specification #1062.

Plaintiff's Identification "2"—Subcontract on Specification #1068.

Plaintiff's Identification "3"—Specifications #1062.

Plaintiff's Identification "4"—Specifications #1068.

It is further stipulated that there are no written agreements between the defendants Macri and de-

defendants Goerig and Philp other than defendants Macri Identification "1" and "2" and defendants Goerig and Philp Identification "1" pertaining to Specifications #1062 and #1068.

It is further stipulated that the Continental Casualty Company is a corporation licensed to do business in the State of Washington and has paid its last and all other license fees. [56]

It is further stipulated that at the time of entering the principal contracts, the defendants, Sam Macri, Joe Macri and Don Macri, were and are still co-partners doing business under the firm name and style of Macri & Company and are all residents of the City of Seattle in the Western District of Washington.

Plaintiff's motion to amend his answer to the cross-complaint of the defendants Macri by setting forth his claim for damages as set forth in his complaint in cause #1496 now pending in the District Court of the United States for the Eastern District of Washington and that he have ten days to file such amendment is granted.

It is further stipulated that the pending cause #1496 in the District Court of the United States for the Western District of Washington will be stayed pending the completion of the pleadings applied for by plaintiff's counsel and upon completion of said pleadings said cause #1496 will be dismissed without prejudice and without costs.

Mr. Holman for the defendants, Macri, moved to amend paragraph 5 of their cross-complaint



against the plaintiff to conform to the facts developed during the taking of the depositions in this cause.

No objections being made thereto, the motion is granted and the defendants, Macri, are given ten days to file said amendent.

It is further stipulated by all parties that the defense of arbitration is waived.

It is further stipulated by all parties that paragraphs "12", "2", "7" and "15" of the amended complaint are admitted.

It is further stipulated by all parties as to paragraph "13" of the amended complaint that the sum of \$32,614.66 has been paid to plaintiff by defendants.

Motion of plaintiff to amend paragraph 8 of his amended complaint next to the last line, by substituting for the words "Exhibit A" the words "Exhibit B" is granted.

Motion for plaintiff to amend paragraph "12" of his amended complaint, next to the last line, by substituting for the words "Exhibit B" the words "Exhibit A" is granted.

It is ordered and adjudged that the above stipulations be and the same are hereby approved and made a part of the record in the above entitled cause, and that the trial of said cause be set for February 20, 1947, at 10:00 a.m.

Dated this 27th day of January, 1947.

SAM M. DRIVER,

United States District Judge.

[Endorsed]: Filed Jan. 27, 1947. [58]



[Title of District Court and Cause.]

AMENDMENT TO ANSWER OF  
CONTINENTAL CASUALTY COMPANY

Second Cause of Action

First Affirmative Defense:

Further answering said Amended Complaint and by way of first affirmative defense thereto, this defendant, Continental Casualty Company, alleges that in the application made for its bond referred to in plaintiff's Complaint, the defendants Macri, doing business as Macri Company, for and on behalf of each of the defendants above named as co-partners and joint adventurers, specifically undertook and agreed in their written application to save harmless and indemnify the Continental Casualty Company against any and all loss, liability and cost on its bond, and that in the event that a judgment is entered in favor of plaintiff herein against this defendant, that this defendant should be subrogated to all rights of the plaintiff in said judgment against each of the defendants, other than this answering defendant.

/s/ EUGENE D. IVY,

Attorney for Defendant

Continental Casualty

Company. [54]

[Endorsed]: Filed Feb. 26, 1947.

In the District Court of the United States for  
the Eastern District of Washington, Southern  
Division

Civil Action No. 246

THE UNITED STATES OF AMERICA for the  
use of M. C. Schaefer, an individual doing  
business as Concrete Construction Company,  
Plaintiff,

vs.

SAM MACRI, DON MACRI, JOE MACRI, A. J.  
GOERIG and CLYDE PHILP, individuals  
and copartners doing business as Macri Com-  
pany, and CONTINENTAL CASUALTY  
COMPANY, a corporation,

Defendants.

#### MACRI'S PROPOSED JUDGMENT

(Refused May 1, 1947. Sam M. Driver, District  
Judge.)

The above-entitled cause having come on duly  
and regularly for trial before the Hon. Sam M.  
Driver, Judge of the above-entitled court, on the  
24th day of February, 1947, the use plaintiff, M. C.  
Schaefer, an individual doing business as Concrete  
Construction Company, appearing in person and by  
his attorney, Harry L. Olson, of Olson & Palmer,  
and the defendants Sam Macri, Don Macri and  
Joe Macri appearing by Sam Macri, and each of  
said defendants Macri appearing by and being  
represented by their attorney, Tom W. Holman, of

Brethorst, Holman, Fowler & Dewar, and the defendants A. J. Goerig and Clyde Philp appearing by A. J. Goerig and their attorney, Kenneth Hawkins, of the firm of Brown & Hawkins, and the defendant Continental Casualty Company appearing by its attorney, Eugene D. Ivy, and the plaintiffs having waived in open court their demand for jury, upon motion having been made by each of the defendants for withdrawal of the case from the jury and the case having proceeded to trial before the court without a jury, and upon the use plaintiff's first witness, M. C. Schaefer been sworn and having disclosed by his testimony that no certificate of assumed trade name had been filed by him for the name Concrete Construction Company, and upon motion by all of the defendants, through their respective counsel of record herein, for dismissal of use plaintiff's complaint herein for failure so to comply with the laws of the State of [60] Washington, the court over objection of said counsel for defendants having permitted such use plaintiff then to file with the Clerk of Yakima County, Washington, a certificate of using such assumed trade name and to treat the amended complaint herein as showing such a filing, and also to treat the respective answers of said several defendants as amended to controvert such filing as untimely and without waiving objection against the use plaintiff further proceeding at trial, the Hon. Sam M. Driver presiding and having heard and considered the evidence submitted by the parties, both oral and docu-

mentary, and having heard and considered the arguments of counsel and the written briefs filed in the matter, and the Court being fully advised in the premises and having heretofore made and entered findings of fact and conclusions of law, now therefore, it is

Ordered, Adjudged and Decreed that the use plaintiff be, and he is hereby, denied any judgment for any amount, and the amended complaint herein be, and it is hereby, dismissed in favor of the defendants Sam Macri, Joe Macri and Don Macri, individually and as copartners doing business as Macri & Company, and against the other defendants to this action.

It Is Further Ordered, Adjudged and Decreed that the defendants Sam Macri, Joe Macri and Don Macri be, and there are hereby, granted judgment against the use plaintiff for the sum of \$28,174.93, together with interest thereon at the rate of six per cent per annum from date hereof until paid, together with said defendants' costs and disbursements herein to be taxed and the sum of \$3,500 as attorneys' fees.

Done in Open Court this 1st day of May, 1947.

-----,  
Judge.

[Endorsed]: Filed May 1, 1947.

[Title of District Court and Cause.]

MACRIS' PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW

(Refused May 1, 1947, Sam M. Driver, District Judge.)

The above-entitled cause having come on duly and regularly for trial before the Hon. Sam M. Driver, Judge of the above-entitled Court, on the 24th day of February, 1947, the use plaintiff, M. C. Schaefer, an individual doing business as Concrete Construction Company, appearing in person and by his attorney, Harry L. Olson, of Olson & Palmer, and the defendants Sam Macri, Don Macri and Joe Macri appearing by Sam Macri, and each of said defendants Macri appearing by and being represented by their attorney, Tom W. Holman, of Brethorst, Holman, Fowler & Dewar, and the defendants A. J. Goerig and Clyde Philp appearing by A. J. Goerig and their attorney, Kenneth Hawkins, of the firm of Brown & Hawkins, and the defendant Continental Casualty Company appearing by its attorney, Eugene D. Ivy, and the plaintiffs having waived in open court their demand for jury, upon motion having been made by each of the defendants for withdrawal of the case from the jury and the case having proceeded to trial before the court without a jury, and upon the use plaintiff's first witness, M. C. Schaefer, having been sworn and having disclosed by his testimony that no certificate of assumed trade name had been filed by him for the name Con-

crete Construction Company, and upon motion by all of the defendants, through their respective counsel of record herein, for dismissal of [62] use plaintiff's complaint herein for failure so to comply with the laws of the State of Washington, the court over objection of said counsel for defendants having permitted such use plaintiff then to file with the Clerk of Yakima County, Washington, a certificate of using such assumed trade name and to treat the amended complaint herein as showing such a filing, and also to treat the respective answers of said several defendants as amended to controvert such filing as untimely and without waving objection against the use plaintiff further proceeding at trial, the Hon. Sam M. Driver presiding and having heard and considered the evidence submitted by the parties, both oral and documentary, and having heard and considered the arguments of counsel and the written briefs filed in the matter, and the court being fully advised in the premises makes the following

### Findings of Fact

#### I.

That this action is brought in the name of the United States of America as plaintiff for the use of M. C. Schaefer, an individual doing business as Concrete Construction Company, under and by virtue of the authority granted by an Act of Congress approved August 24, 1935, Chapter 642, Sections 1 and 2, 49 Statutes at large 793, 794.



## II.

That M. C. Schaefer is an individual doing business as Concrete Construction Company, is the sole owner of said business and a resident of the State of Oregon, without having complied with the laws of the State of Washington as to filing any certificate of such assumed name.

## III.

That Sam Macri, Don Macri and Joe Macri are individuals and co-partners doing business under the assumed name of Macri & Company and are residents of King County, State of Washington, and said defendants are hereinafter referred to as "Macri & Company." That the defendant A. J. Goerig and Clyde Philp are individuals and co-partners doing business as Goerig & Philp and residents of King [63] County, State of Washington.

## IV.

That at all times herein mentioned the defendant Continental Casualty Company was and now is a corporation authorized to transact a surety business in the State of Washington.

## V.

That on or about the 7th day of December, 1943, the United States of America, through the Department of Interior, and the defendants Macri & Company made and entered into a certain contract, being



Contract No. 12-4-14825 for earthwork, pipelines and structural laterals 59.3 to 69.8 and sub-laterals, Roza Division, Yakima Project, Washington, wherein and whereby said defendant Macri & Company contracted to furnish materials and perform work in accordance with the terms of said contract for the sum of \$128,550.95, a copy of which said contract was admitted in evidence as plaintiff's Exhibit 1 and by reference thereto is made a part hereof as though fully set forth herein; that the contract above mentioned and the work to be performed thereunder is hereafter referred to as Contract 1062.

## VI.

That on or about the 7th day of December, 1943, to secure the prompt payment of all persons supplying labor and materials employed or used in the prosecution of work provided for in said contract, said Macri & Company, as principal and the Continental Casualty Company, a corporation, as surety, made, executed and delivered to the United States of America, as obligee, a bond or undertaking as provided by law in the sum of \$64,275.48, which said bond or undertaking was and is by its terms binding upon the surety and upon said principals, their heirs, executors, successors or assigns, and has been at all times since said time and now is in full force and effect, a copy of said bond being admitted in evidence as plaintiff's Exhibit 1 and by reference made a part hereof as though fully set forth herein.

## VII.

That the aforesaid contract was and now is a contract for the prosecution and completion of a public work of the United States within the meaning of the Act [64] of Congress referred to hereinabove and said contract was performed and executed at or near Yakima, Yakima County, Washington, in the Eastern District of the State of Washington.

## VIII.

That on or about the 11th day of December, 1943, the defendants Macri & Company and the defendants A. J. Goerig and Clyde Philp entered into a certain agreement termed a joint venture agreement, a copy of said agreement being admitted in evidence as defendant Macri's Exhibit 7, and by reference made a part hereof as though fully set forth herein.

That said Sam Macri, Don Macri and Joe Macri entered into a similar joint venture agreement with the defendants A. J. Goerig and Clyde Philp as to contract No. 1068, hereinafter referred to, a copy of which joint venture agreement was admitted in evidence as defendant Macri's Exhibit 8, and by reference made a part hereof as though fully set forth herein.

## IX.

That on or about March 14, 1944, the said defendants Macri, acting as aforesaid, entered into a written subcontract with the use plaintiff, as shown by copy thereof admitted in evidence herein as use

plaintiff's Exhibit 5 and by reference made part hereof as though fully set forth herein; said subcontract providing for performance of a portion of aforesaid public work under Contract 1062. That on or about April 21, 1944, said defendants Macri, acting as aforesaid, entered into a written subcontract with the use plaintiff, a copy of which is admitted in evidence as Plaintiff's Exhibit 6, and by reference made a part hereof as though fully set forth herein, under and by the terms of which contract the said use plaintiff contracted to perform a portion of the public work provided under Specification 1068.

#### X.

That pursuant to said subcontract calling for performance of work under said Specification 1062 the use plaintiff completed the work called for by said subcontract and was paid for the performance of said work, with the exception of the [65] sum of \$1,449.88.

#### XI.

That notwithstanding the undertakings, terms and conditions of the aforesaid subcontract calling for the performance of specified work under Specifications 1068 and despite due demand from the defendants Macri, acting as aforesaid, to the use plaintiff, as disclosed by exhibits on file herein and by reference incorporated as part hereof, said use plaintiff failed and refused to commence or perform the work called for by said subcontract. That as a result of said failure and refusal so to perform, the defendants

Macri were compelled to pay and did pay for the performance of the work called for by said subcontract under said Specifications 1068 the sum of \$72,759.98, as evidenced by defendants Macri's Exhibit No. 91 on file herein and by reference incorporated as part hereof. That, after deducting from said sum of \$72,759.98 the amount called for payment for performance of the work under said subcontract in the amount of \$43,135.17, there remained as additional costs to the defendants Macri, by reason of the failure of the use plaintiff, the sum of \$29,624.81, against which there were no payments, credits or offsets save for the aforesaid \$1,449.88 balance earned under the other subcontract for performance under Specifications 1062, and that by the deduction of said amount of \$1,449.88 there remained and has at all times since remained due to the defendants Macri from the use plaintiff the sum of \$28,174.93.

## XII.

That the use plaintiff at all times failed in any and every manner to give any notice as called for by the terms of the aforesaid subcontract in evidence as use plaintiff's Exhibit 5, covering work under Specifications 1062.

## XIII.

That the use plaintiff at all times failed in any and every manner to give any notice as called for by the terms of the aforesaid subcontract in evidence as use plaintiff's Exhibit 2, covering work under Specifications 1068. [66]

## XIV.

That the Treasury Department, acting through the Internal Revenue Service, served upon the defendants a notice of levy claiming a tax lien for \$10,-224.95 against the amount of any recovery in these proceedings, a copy of which notice of tax levy was admitted in evidence as defendant Macri's Exhibit 67.

## XV.

That the sum of \$3,500 is a reasonable sum to be allowed the defendants Macri, acting as aforesaid, as an attorneys' fee against the use plaintiff, M. C. Schaefer, doing business as Concrete Construction Company, herein.

From the foregoing Findings of Fact the Court makes the following:

## Conclusions of Law

That judgment should be entered herein as follows:

1. Denying the use plaintiff any judgment for any amount and dismissing the amended complaint herein in favor of the defendants Sam Macri, Joe Macri and Don Macri, individually and as copartners doing business as Macri & Company, and against the other defendants to this action.

2. That the defendants Sam Macri, Joe Macri and Don Macri should have judgment against the use plaintiff for the sum of \$28,174.93, together with interest thereon at the rate of six per cent per an-

num from date of judgment herein until paid, together with said defendants' costs and disbursements herein to be taxed, and the sum of \$3,500 as attorneys' fees.

Done in Open Court this 1st day of May, 1947.

.....

Judge.

[Endorsed]: Filed May 1, 1947. [67]

---

[Title of District Court and Cause.]

MACRIS' PROPOSED ALTERNATE PROPOSAL IF THE FOREGOING PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT BE NOT ENTERED

(Refused May 1, 1947. Sam M. Driver, District Judge.)

In the event the Court declines to enter the foregoing form and substance of findings of fact, conclusions of law and judgment, as submitted by the defendants Sam Macri, Joe Macri and Don Macri, doing business as Macri & Company, said defendants then, without waiver of any of their rights to except to the Court's failure so to do, submit with respect to any amount of judgment which may be entered against said defendants in favor of the use plaintiff the following proposed findings of fact, conclusions of law and judgment provisions, namely:



## Findings of Fact

That on or about July 15, 1944, the defendants Macri, individually and as copartners, as aforesaid, and the defendants A. J. Goerig and Clyde Philp, individually and as copartners, entered into a written agreement purporting to terminate the aforesaid joint venture agreements in accordance with the terms and provisions of said termination agreement, copy of which said purported termination was admitted in evidence as Goerig & Philp's Exhibit 9 and by reference is made a part hereof as though fully set forth herein; and that the amount of any judgment which may be entered herein against the defendants Sam Macri, Joe Macri and Don Macri, individually and as copartners doing business as Macri & Company, is a [68] loss determined in this action against said defendants and pertaining to the respective public works contracts designated as Specifications 1062 and 1068.

## Conclusions of Law

That the defendants Sam Macri, Joe Macri and Don Macri, individually and as copartners doing business as Macri & Company, should have judgment against the defendants A. J. Goerig and Clyde Philp, individually and as copartners doing business as Goerig & Philp, to the extent of 52 $\frac{1}{3}$ % of whatever amount of judgment may be entered against the said defendants Macri, dealing as aforesaid, together with interest thereon at six per cent

per annum from the date of the judgment, until paid, together with  $52\frac{1}{3}\%$  of all costs and disbursements which may be asserted against the defendants Macri.

That the cross-complaint of the defendants Philp & Goerig against the defendants Macri, dealing as aforesaid, should be dismissed without prejudice and without costs.

### Judgment

That the defendants Sam Macri, Joe Macri and Don Macri, individually and as copartners doing business as Macri & Company, be, and they are hereby, granted judgment against the defendants A. J. Goerig and Clyde Philp, individually and as copartners doing business as Goerig & Philp, in the amount of \$....., together with interest thereon at six per cent per annum from the date of the judgment, until paid, together with  $52\frac{1}{3}\%$  of all costs and disbursements herein taxed against the defendants Macri.

It Is Further Ordered, Adjudged and Decreed that the cross-complaint of the defendants A. J. Goerig and Clyde Philp against the defendants Macri, dealing as aforesaid, be, and the same is hereby, dismissed without prejudice and without costs.

[Endorsed]: Filed May 1, 1947. [69]

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on duly and regularly for trial before the Hon. Sam M. Driver, Judge of the above-entitled court on the 24th day of February, 1947, the use plaintiff, M. C. Schaefer, an individual doing business as Concrete Construction Company, appearing in person and by his attorney, Harry L. Olson, of Olson & Palmer, and the defendants, Sam Macri, Don Macri and Joe Macri, appearing by Sam Macri and each of said defendants Macri appearing by and being represented by their attorney Tom W. Holman, of Brethorst, Holman, Fowler & Dewar, and the defendants, A. J. Goerig and Clyde Philp appearing by A. J. Goerig and their attorney, Kenneth Hawkins of the firm of Brown & Hawkins, and the Continental Casualty Company appearing by its attorney, Eugene D. Ivy, and the plaintiffs having waived in open court their demand for jury upon motion having been made by each of the defendants for withdrawal of the case from the jury, and the case having proceeded to trial before the court without a jury, the Hon. Sam M. Driver presiding and having heard and considered the evidence submitted by the parties, both oral and documentary, and having heard and considered the arguments of counsel and the written briefs filed in the matter, and the court being fully advised in the [70] premises makes the following

## Findings of Fact

## 1.

That this action is brought in the name of the United States of America as plaintiff for the use of M. C. Schaefer, an individual doing business as Concrete Construction Company, under and by virtue of the authority granted by an Act of Congress approved August 24, 1935, Chapter 642, Sections 1 and 2, 49 Statutes at large 793, 794.

## 2.

That M. C. Schaefer is an individual doing business as Concrete Construction Company, is the sole owner of said business and a resident of the State of Oregon and certificate of assumed name was filed in Yakima County as shown by Plaintiffs' Exhibit No. 59.

## 3.

That Sam Macri, Don Macri and Joe Macri are individuals and co-partners doing business under the assumed name of Macri Company and Macri & Company and are residents of King County, State of Washington, and said defendants are hereinafter referred to as "Macri Company." That the defendants A. J. Goerig and Clyde Philp are individuals and were residents of King County, State of Washington, at the time of commencement of the above-entitled action.

4.

That at all times herein mentioned the defendant, Continental Casualty Company was and now is a corporation authorized to transact a surety business in the State of Washington.

5.

That on or about the 7th day of December, 1943, the United States of America, through the Department of Interior, and the defendants Macri Company made and entered into a certain contract, being Contract No. 12-r-14825 for earthwork, pipelines and structural laterals 59.3 to 69.8 and sub-laterals, Roza Division, Yakima Project, Washington, wherein and whereby said defendant Macri Company contracted to furnish materials and perform work in accordance with the terms of said contract for the sum of \$128,550.95, a copy of which said contract was admitted [71] in evidence as plaintiff's Exhibit 1 and by reference thereto is made a part hereof as though fully set forth herein; that the contract above mentioned and the work to be performed thereunder is hereinafter referred to as Contract 1062.

6.

That on or about the 7th day of December, 1943, to secure the prompt payment of all persons supplying labor and materials employed or used in the prosecution of work provided for in said contract, said Macri Company as Principal and the Continental Casualty Company, a corporation, as

surety, made, executed and delivered to the United States of America, as Obligee, a bond or undertaking as provided by law in the sum of \$64,275.48, which said bond or undertaking was and is by its terms binding upon the surety and upon said principals, their heirs, executors, successors or assigns, and has been at all times since said time and now is in full force and effect, a copy of said bond being admitted in evidence as plaintiff's Exhibit 1 and by reference made a part hereof as though fully set forth herein.

## 7.

That the aforesaid contract was and now is a contract for the prosecution and completion of a public work of the United States within the meaning of Act of Congress referred to hereinabove and said contract was performed and executed at or near Yakima, Yakima County, Washington, in the Eastern District of the State of Washington.

## 8.

That on or about the 11th day of December, 1943, the defendants Macri & Company and the defendants A. J. Goerig and Clyde Philp entered into a certain agreement termed a joint venture agreement, a copy of said agreement being admitted in evidence as defendant Macri's Exhibit 7, and by reference made a part hereof as though fully set forth herein.

That said Sam Macri, Don Macri and Joe Macri entered into a similar joint venture agreement with



the defendants A. J. Goerig and Clyde Philp as to contract No. 1068, hereinafter referred to, a copy of which joint venture agreement was admitted in evidence as defendant [72] Macri's Exhibit 8 and by reference made a part hereof as though fully set forth herein.

## 9.

That on or about the 15th day of July, 1944, the defendants, Macri & Company, and the defendants, A. J. Goerig and Clyde Philp, entered into an agreement terminating said joint venture agreement in accordance with the terms and provisions of said termination agreement, a copy of which termination agreement was admitted in evidence as defendant Goerig and Philp's Exhibit 9 and by reference made a part hereof, as though fully set forth herein. That the defendants, Clyde Philp and A. J. Goerig, were not known to the plaintiff until the commencement of this action or shortly thereafter. That Clyde Philp and A. J. Goerig were dormant or silent co-partners or co-adventurers of Macri and Company. That the application for the bond hereinabove referred to and the execution and issuance of the bond by Continental Casualty Company took place four days prior to the execution of said joint venture agreements. That said joint venture agreements executed by Sam Macri, Don Macri, Joe Macri, A. J. Goerig and Clyde Philp specifically ratified and adopted for and on behalf of said joint venture the bond and application for bond executed four days previously. The termination agreement terminating

said joint venture was executed July 15, 1944. That the quasi contract or implied contract by which Maceri and Company are liable to the plaintiff for the value of materials and services furnished was consummated after the date of the termination agreement. The defendants, Clyde Philp and A. J. Goerig, are not liable to the plaintiff. The defendants, Clyde Philp and A. J. Goerig, are liable to the defendant, Continental Casualty Company, on its cross-complaint in the same amount and to the same extent that the defendant, Continental Casualty Company, is liable to the plaintiff.

## 10.

That heretofore and on or about the 14th day of March, 1944, the defendants Maceri Company, writing their name Maceri & Company, entered into a writing with the use plaintiff wherein and whereby said Maceri Company sub-contracted to the said use plaintiff, doing business as Concrete Construction Company the following work "the furnishing of all labor and necessary equipment to do all of the concrete work, form [73] work, cut, bend and install all reinforcing steel, all such work as shown on the plans and as specified in the specifications No. 1062, Contract No. 12-r-14825, Roza Division, Yakima Project, Washington." All of the excavating and all of the materials necessary for the performance of said subcontract by the Concrete Construction Company were to be furnished by the defendants Maceri Company with the exception of form wire, nails and curing material, said excavating and said materials

to be furnished, done and supplied in accordance with the plans and specifications above referred to and in proper time for the performance of said subcontract by the plaintiff, Concrete Construction Company, a copy of said subcontract being admitted in evidence as plaintiff's Exhibit 5 and by reference made a part hereof as though fully set forth herein.

## 11.

That pursuant to said subcontract above referred to, being plaintiff's exhibit 5, the said subcontractor Concrete Construction Company entered into the diligent performance of said subcontract and commenced with the furnishing of labor and materials and the performance of services called for in said subcontract.

## 12.

That it was the obligation of the defendants Macri Company to do the excavation in such a way as to afford reasonable clearance and a reasonable opportunity for the subcontractor to properly and efficiently carry out its part of the work, and that the clearance reasonably required where a form had to be placed between the concrete and the bank required an excavation of 1 foot out at the base of the excavation from the outside wall of the concrete structure to be installed and a slope of one to one on the bank; that the excavation made by Macri & Company was not made in that manner but was made approximately one foot out from the base of the concrete structure and with practically vertical

banks, and that the excavation was not done in a manner to give sufficient clearance, that is, there was not sufficient slope, there was not sufficient width in the excavation to enable the subcontractor to efficiently and properly construct his forms and that he was hindered in the progress of the work, and that the use plaintiff's carpenters installing the forms had to make extra excavation and that this was the rule rather than the exception in the progress of [74] the work.

That the defendants Macri and Company failed to do the fine grading in accordance with the lay-out plans and specifications; that it was defectively and improperly done and that in most instances the carpenters had to do the fine grading before they could install the forms and that this increased the amount of work the use plaintiff had to do and hindered and interfered with his progress of the work.

That the defendants Macri Company failed to make the excavations on time and in an orderly sequence and manner so as to enable the use plaintiff to proceed as he should have been able to do with prompt progress of the work.

### 13.

That with reference to the lumber which the defendants Macri Company were to furnish under the subcontract on Job 1062, sufficient lumber was not furnished, it was not furnished on time and the quality was not proper and suitable for the work intended; that much of the time there was missing

some essential type of lumber so the work was hindered and delayed because of lumber not being properly furnished, not furnished in sufficient quantity and not furnished in the quality which was the minimum requirement for work of this kind.

## 14.

That the defendants Macri Company breached their subcontract in the particulars hereinabove set forth and that said breach on the part of defendants Macri Company was wilful and negligent both as to the character of excavations and fine grading and the time it was done and the amount and quality of lumber and the time it was furnished and that this breach on the defendant Macri Company's part was a continuing breach which continued and existed and persisted throughout the entire performance of said contract 1062 until the very end of its performance by the use plaintiff.

## 15.

That immediately after the commencement of the work by the [75] use plaintiff Concrete Construction Company the said use plaintiff and his representatives complained to the defendants Macri Company and to Mr. Sam Macri and to his agents on the job as to the failure of the defendants Macri Company to comply with the terms of its subcontract, and that said use plaintiff stated he would pull off the job if conditions were not improved and that the defendants Macri Company on several occasions



promised that they would do better and that they would see that their work was done in accordance with the requirements of the subcontract and in a proper manner and advised the use plaintiff that if he would go on and complete the contract that the use plaintiff wouldn't lose anything on the contract and that the defendants Macri Company would make it right and would pay the use plaintiff for what he might lose under the adverse conditions created by the defendants Macri and Company's failure to do their work properly; that by said promises the defendant Macri Company induced the use plaintiff to proceed with the work and that the use plaintiff did proceed with the work by reason of said representations, and that there was an implied agreement or a quasi-contract that the use plaintiff, M. C. Schaefer, was to be paid the fair and reasonable value of his subcontract under the conditions and with the extra burdens imposed upon said use plaintiff by Macri Company's breach and failure to perform his part of the subcontract in the particulars herein set forth.

## 16.

That pursuant to said subcontract as to job 1062 and pursuant to the oral conversations, representations and inducements herein referred to, the use plaintiff Concrete Construction Company between the 14th day of March, 1944, and the first day of May, 1945, furnished labor and materials and performed services for the defendants Macri Company at their special instance and request of the reason-



able cost and value of \$89,498.71; that said labor and materials and services performed are as shown on plaintiff's Exhibit 63 with the exception of the items designated engineering expense of \$201.25, legal expense \$533.57, interest \$3,745.57, which three items the court finds are [76] not proper items.

That the defendants Macri Company have paid on account of said indebtedness the sum of \$32,614.66, leaving a balance now due, owing and unpaid in the amount of \$56,764.97, which amount together with interest at 6% from the date of entry of judgment is now due and owing and unpaid.

17.

That in pretrial proceedings had in this case all of the defendants waived any defense or requirement of arbitration; that more than 90 days have elapsed since the last of said work, labor and materials and services were furnished by said Concrete Construction Company, the use plaintiff, as hereinabove set forth, and that less than one year has elapsed since the complete performance and final settlement on said contract No. 12-r-14825 was made; that final settlement and acceptance under said contract was made on March 31, 1945.

18.

That the ground upon which the jurisdiction of this court is invoked is that the action arises under the Act of Congress referred to hereinabove and also 40 U.C.S.A. 270, which expressly directs the

bringing of this action in this court, to-wit, the United States District, Eastern District of Washington, Southern Division, being the district in which said contract was to be and was performed and executed.

## 19.

That in connection with the bond hereinabove referred to and being admitted into evidence as plaintiff's Exhibit 1, the defendants Macri Company executed an application for said bond on a form of the Continental Casualty Company, said application being admitted into evidence as defendant Casualty Company's Exhibit 10.

## 20.

That the Treasury Department, acting through the Internal Revenue Service, served upon the defendants a notice of levy claiming a tax lien against the amount of any recovery in these proceedings, a copy of which notice of tax levy was admitted in evidence as defendant [77] Macri's Exhibit 67.

## 21.

That heretofore and on or about the 18th day of May, 1944, the defendants Macri Company entered into a written contract with the United States of America, acting by and through its Department of Interior, Bureau of Reclamation, said contract being No. 12-r-14996, specifications No. 1068, for the performance of earthwork, pipelines and structural laterals, Roza Division, Yakima Project, Washing-

ton, according to the terms and specifications in said contract contained and provided and particularly in accordance with said specifications No. 1068, a copy of which contract was received in evidence marked plaintiff's exhibit 2 and by reference made a part hereof, as though fully set forth herein. The contract in this paragraph mentioned and the work to be performed thereunder is hereinafter referred to as contract No. 1068. That thereafter and on or about the 21st day of April, 1944, the defendants, Macri Company, entered into a subcontract in writing with the plaintiff wherein and whereby said Macri Company subcontracted to said Concrete Construction Company and said Concrete Construction Company agreed to do the following:

1. "To furnish all labor, and necessary equipment to do all the concrete work, formwork, structural timber work, cut, bend and install all reinforcing steel, all such work as shown on Plans and as specified in the Specifications No. 1068 Roza Division, Washington. Subcontractor shall clean all concrete forms, remove nails from same and pile same in neat piles.
2. All forms and form lumber at completion of job shall remain the property of the General Contractor. All work shall be done in strict accordance with Plans, Specifications, Government Inspection and to the satisfaction of the General Contractor.
3. "All materials except form wire, nails and securing materials will be furnished by the General Contractor or/and Owner. Sub-contractor

will furnish the above wire, nails and curing materials.

“General Contractor will furnish only form lumber to the sub-contractor.”

a copy of said subcontract being received in evidence as plaintiff's Exhibit 6 and by reference made a part hereof as though fully set forth herein.

22.

That under and by virtue of said contracts and as a condition [78] precedent to the performance of the work and the furnishing of materials by the plaintiff, the defendant was to do and perform all excavating work for the installation and placing of said concrete work and to furnish the form lumber therefor; that notwithstanding their said contract obligation with reference to said excavation work and furnishing of said form lumber, the said defendants wholly failed, neglected and refused to perform said excavating work or to furnish said form lumber or to in any particular perform their part of said contract or tender performance thereof to enable the plaintiff to proceed with the performance on his part of said subcontract; that said plaintiff at all times stood ready, willing and able to perform his part of said subcontract upon the performance by the defendants of their part of said contract necessary and required to be performed by them as a condition precedent to the commencement of work by the plaintiff; that notwithstanding said fact and without ever tendering plaintiff performance on the part of said defendants of their part of said contract, the said defendants without just

cause or excuse therefor and in violation of their said contract had the work called for in said contract performed by third parties.

## 23.

That on November 30, 1944, when the defendants Macri Company addressed a letter to Concrete Construction Company dated November 30, 1944, directing the Concrete Construction Company to proceed with its contract under contract No. 1068, a copy of said letter being received in evidence as plaintiff's Exhibit 30 and by reference made a part hereof as though fully set forth herein, there had never been any excavations fine graded and ready to receive forms, and that on January 3, 1945, when the defendant Macri Company addressed a letter to the Concrete Construction Company holding the said Concrete Construction Company in default, a copy of which letter was admitted in evidence as Plaintiff's Exhibit 31 and by reference made a part hereof as though fully set forth herein, there were no excavations fine graded and ready to receive forms and that the defendant Macri breached said contract 1068, [79] but that the loss of prospective profits as to said contract were too speculative and uncertain and vague to warrant a recovery on the part of use plaintiff Schaefer for more than nominal damages.

## 24.

That in conversations between Mr. Sam Macri and Mr. M. C. Schaefer hereinabove referred to and on many other occasions Mr. Schaefer and his em-



ployees and representatives repeatedly and frequently complained to Mr. Sam Macri and to his agents on the job as to the failure of the defendants Macri to perform said contract No. 1062 according to its terms, including the particulars hereinabove referred to, and that at all times throughout the performance of the work said defendants Macri had notice of these complaints and had notice and knowledge of the defendants Macri's failure and his agents and employees failure to perform said contract No. 1062, according to its terms, that said defendants Macri accepted and acted upon said oral complaints and notices as to said breaches, that the defendants Macri knew of the conditions and that they waived any and all requirements contained in said subcontract No. 1062 as to the giving of written notices.

## 25.

That the sum of \$1,750.00 is a reasonable sum to be allowed the defendant Continental Casualty Company against the other defendants for its reasonable attorney's fees herein.

From the foregoing Findings of Fact the court makes the following

## Conclusions of Law

That judgment should be entered herein as follows:

1. The use plaintiff should have and recover judgment against the defendants, Sam Macri, Don



Macri and Joe Macri, doing business as Macri Company, and the Continental Casualty Company, and each of them, in the sum of \$56,764.97 as to Job 1062, which said amount should bear interest at the rate of 6% per annum from the date of entry of judgment until paid, and that said judgment shall also be against said defendants [80] for use plaintiff's costs and disbursements herein expended and incurred and to be taxed herein.

2. That the use plaintiff, M. C. Schaefer, is not entitled to judgment against the defendant, A. J. Goerig and Clyde Philp.

3. That the defendant Continental Casualty Company, an Indiana corporation, is entitled to recover judgment against the defendants, Sam Macri, Don Macri and Joe Macri, A. J. Goerig and Clyde Philp, and each of them, in the amount of \$56,764.97, together with interest thereon at the rate of 6% per annum from and after the filing of judgment, together with reasonable attorney's fees in the amount of \$1,750.00, together with defendant Continental Casualty Company's costs and disbursements taxed in the amount of \$. . . . ., together with interest at 6% from date of entry of judgment.

4. That the use plaintiff is entitled to judgment against the defendants Sam Macri, Don Macri and Joe Macri for nominal damages in the sum of \$1.00 as to Job No. 1068, which amount shall bear interest at 6% per annum from the date of entry of judgment herein.

5. That the cross-complaint of the defendants Sam Macri, Don Macri and Joe Macri against the use plaintiff should be dismissed with prejudice and without costs and that said defendants recover nothing thereby.

6. That none of the defendants are entitled to recover anything from the use plaintiff.

7. That the judgment of the use plaintiff to be entered herein shall be subject to the lien of the certificate of levy of the United States of America, a copy of which was received in evidence as Macri's Exhibit 67.

8. That the use plaintiff is entitled to maintain this action notwithstanding the non-filing in Yakima County, Washington, of a certificate of assumed name prior to commencement of the trial.

9. The cross-complaint of the defendants, Sam Macri, Don Macri and Joe Macri, against the defendants Clyde Philp and A. J. Goerig should be dismissed without costs.

10. The cross-complaint of A. J. Goerig and Clyde Philp, defendants, against Sam Macri, Don Macri and Joe Macri, defendants, should be dismissed without costs.

Done in Open Court this first day of May, 1947.

/s/ SAM M. DRIVER,

Judge.

Presented by:

/s/ HARRY L. OLSON,

Of Attorneys for Plaintiff.

In the District Court of the United States for the  
Eastern District of Washington, Southern  
Division

Civil Action No. 246

THE UNITED STATES OF AMERICA for the  
use of M. C. Schaefer, an individual doing  
business as Concrete Construction Company,  
Plaintiff,

vs.

SAM MACRI, DON MACRI, JOE MACRI, A. J.  
GOERIG and CLYDE PHILP, individuals  
and co-partners doing business as Macri Com-  
pany, and CONTINENTAL CASUALTY  
COMPANY, a corporation,  
Defendants.

### JUDGMENT

The above entitled cause having come on duly  
and regularly for trial before the Hon. Sam M.  
Driver, Judge of the above entitled Court, on the  
24th day of February, 1947, the use Plaintiff, M. C.  
Schaefer, an individual doing business as Concrete  
Construction Company, appearing in person and by  
his attorney Harry L. Olson, of Olson & Palmer,  
and the Defendants Sam Macri, Don Macri and  
Joe Macri appearing by Sam Macri, and each of  
said Defendants Macri appearing by and being  
represented by their attorney, Tom W. Holman of  
Brethorst, Holman, Fowler and Dewar, and the  
Defendants A. J. Goerig and Clyde Philp appear-  
ing by A. J. Goerig and their attorney Kenneth

Hawkins of the firm of Brown & Hawkins, and the Defendant, Continental Casualty Company appearing by its attorney, Eugene D. Ivy, and the Plaintiffs having waived in open Court their demand for jury, upon motion having been made by each of the Defendants for withdrawal of the case from the jury and the case having proceeded to trial before the Court without a jury, the Hon. Sam M. Driver presiding and having heard and considered the evidence submitted by the parties, both oral and documentary and having heard and considered the arguments of counsel and written briefs filed in the matter, and the [82] Court being fully advised in the premises and having heretofore made and entered its Findings of Fact and Conclusions of Law, now, therefore,

It Is Hereby Ordered, Adjudged and Decreed That the use Plaintiff, M. C. Schaefer have and recover judgment against the Defendants, Sam Macri, Don Macri and Joe Macri, individuals and co-partners doing business as Macri Company, and the Continental Casualty Company, a corporation, and each of them, for the sum of \$56,764.97, together with interest thereon at the rate of 6% per annum from the date hereof until paid, and for the use Plaintiff's costs and disbursements herein expended and incurred in the amount of \$921.70.

It Is Further Ordered, Adjudged and Decreed That Plaintiff's complaint as to the Defendants, A. J. Goerig and Clyde Philp be dismissed with prejudice and without costs.

It Is Further Ordered, Adjudged and Decreed That the Defendant, Continental Casualty Company, an Indiana corporation, have and recover judgment against the Defendants, Sam Macri, Joe Macri and Don Macri, A. J. Goerig and Clyde Philp, and each of them, in the amount of \$56,764.97, together with interest thereon at the rate of 6% per annum from the date hereof, and for the further sum of \$1,750.00 for said Continental Casualty Company's attorney's fees herein, and for its costs and disbursements herein taxed in the amount of \$ none, together with interest at 6% from the date hereof.

It Is Further Ordered, Adjudged and Decreed That the use Plaintiff, M. C. Schaefer have and recover judgment against the Defendants, Sam Macri, Joe Macri and Don Macri, co-partners and individuals doing business as Macri Company, for the sum of \$1.00 damages as to Specifications 1068, which amount shall bear interest at 6% per annum from the date hereof.

It Is Further Ordered, Adjudged and Decreed That the cross-complaint of the Defendants, Sam Macri, Joe Macri and Don Macri against the use Plaintiff be and the same is hereby dismissed with prejudice and without costs and that said Defendants recover nothing thereby.

It Is Further Ordered, Adjudged and Decreed that the judgment of the use Plaintiff entered herein is subject to the lien of the United States of America under its certificate of levy, copy of

which was received in evidence as Macris' Exhibit 67. [83]

It Is Further Ordered, Adjudged and Decreed That the cross-complaint of Sam Macri, Joe Macri and Don Macri against the Defendants A. J. Goerig and Clyde Philp be and the same is hereby dismissed without costs.

It Is Further Ordered, Adjudged and Decreed That the cross-complaint of A. J. Goerig and Clyde Philp against the Defendants, Sam Macri, Joe Macri and Don Macri, be and the same is hereby dismissed without costs.

Done in Open Court this first day of May, 1947.

SAM M. DRIVER,  
Judge.

Presented by:

HARRY L. OLSON,  
Of Attorneys for Plaintiff.

[Endorsed]: Filed May 1, 1947. [84]

---

[Title of District Court and Cause.]

### MOTION FOR NEW TRIAL

Comes now, Continental Casualty Company, a corporation, one of the defendants in the above-entitled cause, and moves the Court for an order vacating and setting aside the judgment in the above-entitled action and awarding a new trial for the following reasons:



1.

The judgment was not sustained by substantial evidence.

2.

The judgment was contrary to law.

3.

The Court erred in finding that any sum in excess of \$2656.46 was owing by this defendant, Continental Casualty Company, a corporation, to the plaintiff.

4.

The Court erred in finding as a fact that the law of the State of Washington applied and that the Federal rule as to damages did not apply.

5.

That the Court erred in entering judgment against the defendant, Continental Casualty Company, for any sum in excess of \$2656.46. [85]

6.

That said motion is further based upon all the files and records in said cause.

Dated this 8th day of May, 1947.

EUGENE D. IVY,  
Attorney for Defendant,  
Continental Casualty  
Company.

[Endorsed]: Filed May 9, 1947. [86]

[Title of District Court and Cause.]

ORDER DENYING MOTIONS FOR  
NEW TRIAL

The above entitled cause having come on regularly for argument on this 20th day of May, 1947, upon the motion of A. J. Goerig and Clyde Philp and upon the motion of Continental Casualty Company, a corporation, for a new trial in the above entitled matter, the Continental Casualty Company appearing by and through its attorney Eugene D. Ivy, and the defendants, A. J. Goerig and Clyde Philp appearing by and through their attorneys, Brown & Hawkins, and the use plaintiff appearing by and through his attorney, Harry L. Olson, and the Court having duly considered said motions and argument of counsel and being fully advised in the premises,

It Is Hereby Ordered That the motion of A. J. Goerig and Clyde Philp for a new trial and the motion of the Continental Casualty Company for a new trial, and each of them, be and the same are hereby denied.

Done in Open Court this 20th day of May, 1947.

/s/ SAM M. DRIVER,

Judge.

Presented by:

/s/ HARRY L. OLSON,

Of Attorneys for Plaintiff.

[Endorsed]: Filed May 20, 1947. [87]

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that the Continental Casualty Company, a corporation, one of the defendants above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in the above-entitled action on the 1st day of May, 1947.

/s/ EUGENE D. IVY,  
Attorney for Appellant,  
Continental Casualty  
Company.

Copy mailed to Holman, Olsen & Hawkins  
5/21/47.

A. A. LaFRAMBOISE,  
Clerk.

[Endorsed]: Filed May 20, 1947. [88]

---

[Title of District Court and Cause.]

### ORDER DETERMINING AMOUNT OF BOND

This matter coming on duly and regularly before the undersigned Judge of the above-entitled Court, upon the motion of the defendant Continental Casualty Company, pursuant to Rule 73, Subdivision "E" of Rules of Civil Procedure, and the Court being fully advised;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the defendant Continental Casualty Company be, and the same is, hereby authorized to file a supersedeas bond of appeal herein within five days from the date hereof, which supersedeas appeal bond shall be in the sum of Sixty-five thousand dollars.

Done in Open Court this 20th day of May, 1947.

/s/ SAM M. DRIVER,  
Judge.

Presented by:

EUGENE D. IVY,  
Attorney for Defendant,  
Continental Casualty  
Company.

[Endorsed]: Filed May 20, 1947.

---

[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND  
ON APPEAL

Bond #910100. National Casualty Company  
Know All Men by These Presents: That we, Continental Casualty Company, a corporation, as principal and National Casualty Company, a Michigan Corporation, as surety, acknowledge ourselves to be jointly indebted to M. C. Schaefer, an individual doing business as Concrete Construction Company,

as use plaintiff and appellee in the above cause in the sum of Sixty-five Thousand and no/100 (\$65,000.00) Dollars, conditioned that whereas on the 1st day of May, 1947, in the District Court of the United States for the Eastern District of Washington, Southern Division, in a suit pending in that court wherein M. C. Schaefer, an individual doing business as Concrete Construction Company, was use plaintiff and Continental Casualty Company was one of the defendants, numbered on the Civil Docket as 246, a judgment was rendered against the said Continental Casualty Company; and the said Continental Casualty Company having filed in the office of the Clerk of said District Court a Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco in the State of California.

Now the condition of the above obligation is such that if the said Continental Casualty Company shall prosecute its appeal to effect and satisfy the said judgment in full together with costs, interest and damages for delay, if for any reason the appeal is dismissed, or if the judgment is affirmed, and satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge [90] and award, then the above obligation is void, else to remain in full force and effect.

Sealed with our seals and dated this 22nd day of May, 1947.

[Seal]

CONTINENTAL CASUALTY  
COMPANY,

By /s/ WARNER M. BRUCE,  
Superintendent of Claims,  
Principal.

[Seal]

NATIONAL CASUALTY  
COMPANY,

By /s/ L. G. GREWE,  
Attorney-in-Fact,  
Surety.

Approved this 26th day of May, 1947.

SAM M. DRIVER,  
Judge.

[Endorsed]: Filed May 26, 1947. [91]

---

[Title of District Court and Cause.]

APPELLEES' DESIGNATION OF CONTENTS  
OF RECORD ON APPEAL

Comes now the Appellee, by his attorneys, Harry L. Olson and Fred C. Palmer, and designates the following proceedings and evidence, which he wishes prepared for transmission to the Circuit Court of Appeals, in addition to the pleadings, proceedings and evidence, heretofore designated by the Appellant. Said Appellee's designation is in connection with the appeal, heretofore filed in the above cause:



## 1. Exhibits as follows:

Plaintiff's Exhibits 12, 22, 23, 24, 25, 26,  
29, 44, 49, 51, 60.

2. Reporter's transcript of evidence of the testimony of L. R. Hendershot, W. E. Schaefer and Fred Waltie.

Dated this 14th day of June, 1947.

Respectfully submitted,

HARRY OLSON,

FRED C. PALMER,

Attorneys for Appellee,

M. C. Schaefer.

Service accepted and copy received of the foregoing Appellee's Designation of Contents of Record on Appeal this 14th day of June, 1947.

EUGENE D. IVY,

Attorney for Appellant,

Continental Casualty  
Company.

[Endorsed]: Filed June 14, 1947. [92]

[Title of District Court and Cause.]

STIPULATION FOR TRANSMISSION OF  
EXHIBITS TO CIRCUIT COURT OF AP-  
PEALS

It Is Hereby Stipulated by and between Harry L. Olson and Fred C. Palmer, attorneys for the Plaintiff, and Eugene D. Ivy, attorney for Defendant Continental Casualty Company, a corporation, that the following exhibits, to-wit, Plaintiff's Exhibits:

1, 3, 5, 12, 22, 23, 24, 25, 26, 29, 44, 49, 51,  
60, 61 and 63, Defendant Macris' Exhibit 7,  
Continental Casualty Company's Exhibit 10,

the same being printed matter and physical exhibits, not capable of adequate reproduction, be submitted to the Circuit Court of Appeals as a part of the record of appeal of the Continental Casualty Company.

Dated this 14th day of June, 1947.

HARRY L. OLSON,

FRED C. PALMER,

Attorneys for use Plaintiff,

M. C. Schaefer.

EUGENE D. IVY,

Attorney for Defendant,

Continental Casualty

Company.

[Endorsed]: Filed June 14, 1947. [93]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

1. The United States District Court was in error in granting judgment to the plaintiff and refusing to grant a new trial for the defendant Continental Casualty Company, for the reason that there was no evidence presented segregating the items of expense within and without the contract, and the law will not allow recovery from the surety on a payment bond for items properly classified as damages.

2. The United States District Court erred in holding as a matter of law that under the Miller Act compensation on quantum meruit for labor and material furnished because the prime contractor breached his contract by delaying the job or failing to do the things required under the subcontract can be recovered from the surety on the payment bond.

3. The United States District Court erred in not holding that any amounts recoverable from the defendant Macris in excess of \$2656.46 was without the scope of the contract and therefore not recoverable against the surety, Continental Casualty Company.

EUGENE D. IVY,

Attorney for Appellant.

Service accepted and copy received of foregoing Statement of Points on Appeal this 6th day of June, 1947.

FRED C. PALMER,

HARRY L. OLSON,

Of Attorneys for Use

Plaintiff, M. C. Schaefer.

[Endorsed]: Filed June 6, 1947. [94]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF  
CONTENTS OF RECORD ON APPEAL

Comes Now, the appellant by its attorney, Eugene D. Ivy, and designates the following pleadings, proceedings and evidence which it wishes prepared for transmission to the Circuit Court of Appeals in connection with the appeal heretofore filed in the above cause:

1. Plaintiff's Amended Complaint.
2. Defendant Continental Casualty Company's Answer.
3. Order on Pre-Trial.
4. Amendment of Continental Casualty Company to First Affirmative Defense of Second Cause of Action of Answer.
5. Reporter's transcript of evidence of the testimony of M. C. Schaefer, Al Hunter and Larry Bufton, and reporter's transcript of Court's Decision.
6. Exhibits as follows:  
Plaintiff's Exhibits 1, 3, 5, 61 and 63;  
Defendant Macris' Exhibit 7;  
Continental Casualty Company's Exhibit 10.
7. Findings of Fact and Conclusions of Law.
8. Judgment.
9. Motion for New Trial.

10. Order Denying Motion for New Trial.
11. Notice of Appeal.
12. Order Authorizing Filing of Bond.
13. Bond.
14. Stipulation for Transmission of Exhibits to Circuit Court.
15. Order Directing Clerk to Transmit Exhibits to Circuit Court.
16. Statement of Points on Appeal.
17. Appellant's Designation of Record on Appeal. [95]

Dated this 5th day of June, 1947.

Respectfully submitted,

EUGENE D. IVY,

Attorney for Appellant,  
Continental Casualty  
Company.

Service accepted and copy received of the foregoing Appellant's Designation of Contents of Record on Appeal this 6th day of June, 1947.

FRED C. PALMER,

HARRY L. OLSON,

Of Attorneys for Use  
Plaintiff, M. C. Schaefer.

[Endorsed]: Filed June 6, 1947. [96]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR PREPARATION AND DOCKETING OF RECORD ON APPEAL

It appearing to the Court that a notice of appeal was filed in the above entitled cause on May 20, 1947;

And it further appearing to the Court that since said date the official court reporter of this Court has been engaged in reporting trials for a large portion of that period, and will be unable to transcribe the testimony as requested by appellants within the period prescribed by rules;

Now, Therefore, the Court on its own motion does hereby extend the time for the preparation and docketing of the record on appeal in said cause for a period of ninety (90) days from the date of the filing of the notice of appeal as herein above set forth.

Dated this 18th day of June, 1947.

SAM M. DRIVER,

United States District Judge.

---

[Title of District Court and Cause.]

ORDER DIRECTING CLERK TO TRANSMIT EXHIBITS TO CIRCUIT COURT OF APPEALS

This matter, coming on regularly before the undersigned Judge of the above entitled Court, on



the stipulation of counsel for the use Plaintiff, M. C. Schaefer, and the Continental Casualty Company, Defendant, and the Court being advised in the premises;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed: That the Clerk of the Court be and he is hereby directed and authorized to transmit to the Circuit Court of Appeals, Plaintiff's Exhibits 1, 3, 5, 12, 22, 23, 24, 25, 26, 29, 44, 49, 51, 60, 61, and 63, Defendant Macris' Exhibit 7, Continental Casualty Company's Exhibit 10, such exhibits being evidence not capable of adequate reproduction.

It Is Further Ordered, Adjudged and Decreed that the Clerk of the Court take such precautions as are necessary for the safe keeping, transportation and return of said original exhibits.

Done in Open Court this 18th day of June, 1947.

SAM M. DRIVER,  
Judge. [98]

Presented by:

EUGENE D. IVY,  
Attorney for Defendant  
Continental Casualty  
Company.

Approved as to form:

HARRY L. OLSON,  
FRED C. PALMER,  
Attorneys for Use Plaintiff,  
M. C. Schaefer.

[Endorsed]: Filed June 18, 1947. [99]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that A. J. Goerig and Clyde Philp, two of the defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in the above entitled action on the 1st day of May, 1947, and from an order denying A. J. Goerig and Clyde Philp's motion for new trial entered on the 20th day of May, 1947.

/s/ KENNETH C. HAWKINS,

/s/ NAT. N. BROWN,

Attorneys for Appellants,

A. J. Goerig and

Clyde Philp.

[Endorsed]: Filed July 29, 1947. [100]

---

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

No. 42447. Manufacturers Casualty Insurance Co.

Know All Men By These Presents:

That we, A. J. Goerig & Clyde Philp, the Defendants above named, as Principal, and the Manufacturers Casualty Insurance Company, a corporation organized under the laws of the State of Pennsylvania, and legally doing business in the State of

Washington, as Surety, are held and firmly bound unto Sam Macri, Don Macri, Joe Macri, d/b/a Macri Company, and the Continental Casualty Company, a corporation, and to M. C. Schaefer, an individual, d/b/a Concrete Construction Company, in the just and full sum of Two Hundred Fifty Dollars (\$250.00), for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seal and dated this 24th day of July, 1947.

The Condition Of This Obligation Is Such, that Whereas, the above named Plaintiff, M. C. Schaefer, d/b/a Concrete Const. Co., on the 1st day of May, 1947, in the above entitled action and Court, recovered judgment against the Defendant, Sam Macri, Don Macri and Joe Macri and the Continental Casualty Co., above named, in the amount of \$56,764.97, and for Plaintiff's costs in the amount of \$921.70, plus \$1.00 damages and the Continental Casualty Company recovered judgment over against A. J. Goerig and Clyde Philp in said amounts plus \$1,750.00 attorneys fees.

And Whereas, the above named Principals have heretofore given due and proper notice that they appeal from said decision and judgment of said District Court to the Circuit Court of Appeals for the Ninth Circuit.

Now, Therefore, If the said Principals, A. J. Goerig & Clyde Philp, shall pay M. C. Schaefer,

an Individual d/b/a Concrete Construction Company, Sam Macri, Don Macri, and Joe Macri, and the Continental Casualty Company, all costs and damages that may be awarded against them on the appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty Dollars (\$250.00), then this obligation to be void; otherwise to remain in full force and effect.

A. J. GOERIG,  
CLYDE PHILP,  
MANUFACTURERS  
CASUALTY INSURANCE  
COMPANY,

[Seal] By A. A. NAEF,  
Attorney-in-Fact.

[Endorsed]: Filed July 29, 1947. [101]

---

[Title of District Court and Cause.]

APPELLANTS' A. J. GOERIG AND CLYDE  
PHILP'S DESIGNATION AND CON-  
TENTS OF RECORD ON APPEAL

Come now appellants, A. J. Goerig and Clyde Philp, designated hereinabove as defendants and designate the following pleadings and proceeding and evidence which they wish prepared for transmission to the Circuit Court of Appeals in connection with the appeal heretofore filed in the above cause.

1. Answer of A. J. Goerig and Clyde Philp.

2. Recorder's transcript of testimony of A. J. Goerig.

3. Deposition of Clyde Philp.

4. Exhibit 7. Joint venture agreement with respect to 1062.

5. Exhibit 8. Joint venture agreement with respect to 1068.

6. Exhibit 9. Termination Agreement.

7. Exhibit 10. Application for bond with respect to 1062.

8. A. J. Goerig and Clyde Philp's Notice of Appeal.

9. A. J. Goerig and Clyde Philp's Statement Points on Appeal.

10. Bond on Appeal. [102]

11. Exhibit 59. Certificate of assumed business name.

Respectfully submitted,

KENNETH C. HAWKINS,  
NAT. U. BROWN,

Attorney for Respondents.

Service accepted and copy received of appellants' designation of contents of record of appeal.

Dated July 29, 1947.

EUGENE D. IVY,

Attorneys for Respondents.

[Endorsed]: Filed July 29, 1947. [103]

[Title of District Court and Cause.]

APPELLANTS' A. J. GOERIG AND CLYDE  
PHILP'S STATEMENT OF POINTS ON  
APPEAL

I. The United States District Court was in error in entering judgment against Clyde Philp and A. J. Goerig in favor of the Continental Casualty Company for the following reasons:

1. Goerig and Philp did not sign and were not parties to the application for the bond or to the bond itself and were not partners of Macri & Company at the time thereof.

2. The Continental Casualty Company did not rely on credit of Goerig and Philp and did not know they were connected with the Macri Company.

3. Goerig and Philp received no proceeds or benefits from the bond, nor did Macri & Company while Goerig and Philp were its silent "partners."

4. The "silent" partnership was terminated prior to attaching of liability on the bond.

5. Parties to a contract can modify or alter same—or rescind it—even tho there be a creditor beneficiary, unless and until the creditor beneficiary has changed his position in reliance thereon. [104]

6. A principal is not liable to a surety for an indebtedness that is not the obligation of the principal, even tho, for some other reason the surety is liable to the creditor.



II. The United States District Court was in error in refusing to grant A. J. Goerig and Clyde Philp a new trial for the same reasons set forth in the last preceding paragraph.

KENNETH C. HAWKINS,  
NAT. U. BROWN,  
Attorneys for Appellants.

Copy rec'd.

/s/ HARRY OLSON,  
Atty. for M. C. Schaefer.

[Endorsed]: Filed July 30, 1947. [105]

---

[Title of District Court and Cause.]

### AFFIDAVIT OF SERVICE

State of Washington,  
County of Yakima—ss.

Kenneth C. Hawkins, being first duly sworn on oath deposes and says: That at all times hereinafter mentioned he was and now is a citizen of the United States and of the State of Washington and a resident of Yakima County in said State, above the age of twenty-one years and not a party to, or in any way interested in the above named action, and competent to be a witness therein; that he received copies of appellants' A. J. Goerig and Clyde Philp's

Designation of Contents Of Record Of Appeal and Statement Of Points On Appeal in the above matter on the 29th day of July, 1947, and on said date caused the same to be served by delivering same to Eugene Ivy, Attorney for the Continental Casualty Company, and Harry L. Olson, Attorney for use plaintiff, and by depositing same in the Post Office at Yakima, Washington, addressed to Thomas Holman, of Brethorst, Holman, Fowler & DeWar, Hoge Building, Seattle 4, Washington, attorney for defendants Macri, the same being sent by [106] regular mail with sufficient postage affixed in the manner required by law.

/s/ KENNETH C. HAWKINS.

Subscribed and sworn to before me this 4th day of August, 1947.

[Seal]     /s/ DOROTHY ESCHBACH,

Notary Public in and for the State of Washington,  
residing at Yakima.

[Endorsed]: Filed Aug. 4, 1947. [107]

[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that Sam Macri, Don Macri and Joe Macri, defendants above named, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in the above-entitled action on the 1st day of May, 1947, and after entry of order denying motions for new trial on the 20th day of May, 1947.

S. W. BRETHORST,  
TOM W. HOLMAN,  
THOMAS N. FOWLER,  
WARREN L. DEWAR,

Attorneys for Appellants Sam  
Macri, Don Macri and Joe  
Macri.

Copy mailed to Harry L. Olson, Eugene D. Ivy and Brown & Hawkins this 18th day of August, 1947.

A. A. LaFRAMBOISE,  
Clerk.

By THOMAS GRANGER,  
Deputy.

[Endorsed]: Filed Aug. 18, 1947. [108]

[Title of District Court and Cause.]

BOND ON APPEAL TO CIRCUIT COURT OF  
APPEAL, NINTH DISTRICT

Know All Men By These Presents, That we, Sam Macri, Don Macri and Joe Macri, as Principals and Maryland Casualty Company, as Surety, are held and firmly bound unto the United States of America for the use of M. C. Schaefer, plaintiff in the above entitled action and appellee upon appeal therefrom and for the use and benefit of the other defendants named in said action, as interest may appear under the terms and conditions hereinafter stated in the just and full sum of Two Hundred and Fifty and No/100 Dollars (\$250.00) lawful money of the United States of America.

Dated this 15th day of August, 1947.

The condition of the foregoing obligation is such that,

Whereas, Sam Macri, Don Macri and Joe Macri have appealed to the U. S. Circuit Court of Appeals, Ninth District from a judgment entered in the above entitled action by the District Court of the United States for the Eastern District of Washington, Southern Division.

Now, Therefore, if the said Sam Macri, Don Macri and Joe Macri shall pay and fully satisfy all costs, if the appeal by them is dismissed or if the aforesaid judgment is affirmed, or shall pay such costs as the said U. S. Circuit Court of Appeals for the Ninth District may award if said judgment is

modified, then this instrument shall be null, void and of no effect; otherwise of full force and virtue.

/s/ SAM MACRI,  
/s/ DON MACRI,  
/s/ JOE MACRI,  
MARYLAND CASUALTY  
COMPANY,

[Seal] By H. T. HANSEN,  
Attorney-in-Fact.

[Endorsed]: Filed Aug. 18, 1947. [109]

---

[Title of District Court and Cause.]

APPELLANTS SAM MACRI, DON MACRI  
AND JOE MACRI'S STATEMENT OF  
POINTS ON APPEAL

1. The United States District Court was in error in entering any judgment against the defendants Sam Macri, Don Macri and Joe Macri in favor of the use plaintiff, M. C. Schaefer; and,

2. The United States District Court was in error in refusing to enter judgment in favor of the defendants Sam Macri, Don Macri and Joe Macri against the use plaintiff, M. C. Schaefer, as prayed in the defendants' answer and cross-complaint to the amended complaint, for the following reasons:

- (1) The relationship between said defendants and said use plaintiff were contractual and based on written contracts and subcontracts

in evidence as plaintiff's Exhibits 1, 2, 3, 4, 5 and 6, which were not in any manner abrogated, superseded or rendered nugatory;

- (2) There was a failure of all competent proof of any amount to support the judgment entered in favor of the use plaintiff because original book entries were not either introduced or supported by testimony of anyone making entries therein;

3. The United States District Court was in error in refusing to enter judgment in favor of the Defendants Sam Macri, Don Macri and Joe Macri against the use plaintiff, M. C. Schaefer, as prayed in said defendants' answer and cross-complaint, on the ground and for the reason that under the aforesaid written [110] contractual arrangements shown by plaintiff's Exhibits 1, 2, 3, 4, 5 and 6 there was failure of compliance with the contractual undertakings of the said use plaintiff as provided for thereby;

4. The United States District Court was in error in refusing to enter judgment in favor of the defendants Sam Macri, Don Macri and Joe Macri against the defendants A. J. Goerig and Clyde Philp, as prayed in the answer and cross-complaint of said defendants Macri to the amended complaint, for the reason that the joint venture agreements, defendants' Exhibits 7 and 8, applied, when read with the termination of joint venture agreements shown by defendants Goerig and Philp's Exhibit 9,



to hold the said defendants, Sam Macri, Don Macri and Joe Macri, free from loss sustained in performance of the principal contracted work called for by plaintiff's exhibits 1 and 2; and

5. The United States District Court was in error in refusing to dismiss the action of the use plaintiff, M. C. Schaefer, on the ground and for the reason that the said use plaintiff had not, at time of commencement of the action or at all until after challenge to such use plaintiff's legal capacity to sue, filed any certificate of assumed trade name for doing business as Concrete Construction Company, which was finally admitted, over objections, as plaintiff's Exhibit 59.

Respectfully submitted,

S. W. BRETHORST,

TOM W. HOLMAN,

THOMAS N. FOWLER,

WARREN L. DEWAR,

Attorneys for Appellants Sam  
Macri, Don Macri and Joe  
Macri.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Aug. 18. 1947. [111]

[Title of District Court and Cause.]

APPELLANTS SAM MACRI, DON MACRI  
AND JOE MACRI'S DESIGNATION OF  
CONTEXT OF RECORD TO BE SUPPLE-  
MENTED ON APPEAL

Come Now the appellants Sam Macri, Don Macri and Joe Macri, hereinabove designated as defendants, and designate the following pleadings, proceedings and evidence which they wish prepared for transmission to the United States Circuit Court of Appeals for the Ninth Circuit in connection with the appeal heretofore filed by them in the above cause, namely:

1. Answer and cross-complaint of defendants Sam Macri, Joe Macri and Don Macri to the amended complaint of plaintiff, verified June 6, 1946;

2. Plaintiff's amended reply and cross-complaint to the cross-complaint of the defendants Macri;

3. Cross-complaint of defendants Clyde Philp and A. J. Goerig against the defendants Macri;

4. Bill of particulars of the defendants A. J. Goerig and Clyde Philp;

5. Answer of defendants Sam Macri, Don Macri and Joe Macri to cross-complaint of defendants Clyde Philp and A. J. Goerig;

6. Reply of defendants A. J. Goerig and Clyde Philp to answer and cross-complaint of the defendants Macri;

7. Proposed findings of fact, conclusions of law and judgment as proposed and submitted to the District Court by the defendants Sam Macri, Don Macri and Joe Macri; [113]

8. Alternate proposal if foregoing proposed findings of fact and judgment be not entered, as proposed and submitted to the District Court by the defendants Sam Macri, Don Macri and Joe Macri;

9. Notice of appeal by appellants Sam Macri, Don Macri and Joe Macri;

10. Bond for costs on appeal by said appellants Macri;

11. Supplemental order from the United States Circuit Court of Appeals, Ninth Circuit, directing Clerk of the U. S. District Court, astern District of Washington, Southern Division, to transmit additional records, exhibits and certification to such Circuit Court;

12. Statement of points on appeal by the appellants Sam Macri, Don Macri and Joe Macri;

13. Recorder's transcript of all proceedings, other than final arguments, not previously prepared for certification and transmittal to the United States Circuit Court of Appeals, Ninth Circuit;

14. All exhibits admitted and all exhibits proffered and rejected not heretofore certified and transmitted by the Clerk of the said District Court to the United States Circuit Court of Appeals, Ninth Circuit, and

15. Any depositions admitted and received in evidence and not previously transmitted by the Clerk of said District Court to the United States Circuit Court of Appeals, if not included in the transcript of testimony.

Respectfully submitted,

S. W. BRETHORST,  
TOM W. HOLMAN,  
THOMAS W. FOWLER,  
WARREN L. DEWAR,

Attorneys for Appellants Sam  
Macri, Don Macri and Joe  
Macri.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Aug. 18. 1947. [114]

[Title of District Court and Cause.]

APPELLANT'S SUPPLEMENTAL  
DESIGNATION OF RECORD

Comes now the appellant, Continental Casualty Company, a corporation, and in addition to the record heretofore designated by it, hereby designates the following to be added to the record herein for transmission to the Circuit Court of Appeals:

Order entered herein by the above entitled court in June, 1947, extending time for filing record on appeal, and this supplemental designation.

EUGENE D. IVY  
ELWOOD HUTCHESON,  
Attorneys for Appellant,  
Continental Casualty  
Company.

Copy received this 19th day of August, 1947.

OLSEN & PALMER,  
Attorneys for use of  
M. C. Schaefer.

BROWN & HAWKINS,  
Attorneys for Defendants,  
Goerig and Philp.

[Endorsed]: Filed Aug. 19, 1947. [116]

In the United States Circuit Court of Appeals  
for the Ninth Circuit

Civil Action No. 246

THE UNITED STATES OF AMERICA for the  
use of M. C. SCHAEFER, an individual doing  
business as Concrete Construction Company,  
Appellee,

vs.

SAM MACRI, DON MACRI, JOE MACRI, A. J.  
GOERIG and CLYDE PHILP, individuals  
and co-partners doing business as Macri Com-  
pany, and Continental Casualty Company, a  
corporation,

Appellants.

ORDER EXTENDING TIME TO FILE  
SUPPLEMENT OF RECORD

Based on the application of the appellants Sam Macri, Don Macri and Joe Macri, notice of appeal to the above-entitled court by whom was entered after certification by the Clerk of the District Court for the Eastern District of Washington, Southern Division, to the above-entitled Circuit Court of a transcript of record on appeal, based on the appeals by the appellants Continental Casualty Company and A. J. Goerig and Clyde Philp from Civil Action No. 246 in said District Court; and the court deeming it proper that additional extension of time should be made supplementing the order extending time entered in said Civil Cause No. 246 by the



United States District Judge on June 18, 1947, in order to allow for the preparation, certification and transmittal to the above-entitled court of the additional matters required by said additional appellants; and for good cause shown;

Now Therefore, the above-entitled court, on its own motion, does hereby extend the time for preparation and docketing of the additional record on appeal in said cause for a period of 50 days from date of filing this order within which to certify and transmit the same by the Clerk of the United States District Court for the Eastern District of Washington, Southern Division; and [117]

It Is Further Ordered that a copy of this order, duly attested, be transmitted to the Clerk of the said District Court.

Dated this 18th day of August, 1947.

FRANCIS A. GARRECHT,  
Judge of the above-entitled  
Court.

[Endorsed]: Filed Aug. 18, 1947. Paul P. O'Brien, Clerk.

A true copy.

Attest: Aug. 18, 1947. Paul P. O'Brien, Clerk;  
by F. T. Schmid, Deputy Clerk. [118]

In the District Court of the United States for the  
Eastern District of Washington, Southern  
Division

No. 246

THE UNITED STATES OF AMERICA for the  
use of M. C. SCHAEFER, an individual doing  
business as Concrete Construction Company,  
Plaintiff,

vs.

SAM MACRI, DON MACRI, JOE MACRI, A. J.  
GOERIG and CLYDE PHILP, individuals  
doing business as Macri Company, and CON-  
TINENTAL CASUALTY COMPANY, a cor-  
poration,

Defendants.

ORDER DIRECTING CLERK TO TRANSMIT  
EXHIBITS TO CIRCUIT COURT OF AP-  
PEALS

Based on the application of the defendants, Sam Macri, Don Macri, and Joe Macri, and in furtherance of their appeal to the United States Circuit Court of Appeals for the Ninth Circuit, it is

Ordered that the Clerk of the above-entitled Court be, and he is hereby, directed to send the originals of the following exhibits to the Clerk of the said United States Circuit Court, at San Francisco, California, namely:

Plaintiff's Exhibits: 4, 6, 41, 42, 43, 45, 46, 47, 48, 64, 70, 90, 123, and 129.

Defendants Macris' Exhibits: 15-a, 34, 35, 50, 50-a, 67, 74, 77, 78, 81, 82, 99, 100, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, and 116.

Defendants Goerig and Philp's Exhibit: 122.

Identifications: 72 and 120.

Dated this 12th day of September, 1947.

SAM M. DRIVER,

United States District Judge.

[Endorsed]: Filed Sept. 12, 1947. [119]

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11707

**THE UNITED STATES OF AMERICA** for the  
use of **M. C. SCHAEFER**, an individual doing  
business as Concrete Construction Company,  
Appellee,

vs.

**SAM MACRI, DON MACRI, JOE MACRI, A. J.  
GOERIG and CLYDE PHILP**, individuals  
and co-partners doing business as Macri Com-  
pany, and **CONTINENTAL CASUALTY  
COMPANY**, a corporation,  
Appellants.

**ORDER EXTENDING TIME TO FILE  
SUPPLEMENT OF RECORD**

Based on the application of the appellants Sam Macri, Don Macri, and Joe Macri, notice of appeal to the above-entitled court by whom was entered after certification by the Clerk of the District Court for the Eastern District of Washington, Southern Division, to the above-entitled Circuit Court of a transcript of record on appeal, based on the appeals by the appellants Continental Casualty Company and A. J. Goerig and Clyde Philp from Civil Action No. 246 in said District Court; and the court deeming it proper that additional extension of time should be made supplementing the order extending time entered in said Civil Cause No. 246 by the

United States District Judge on June 18, 1947, and the order extending time to file supplement of record entered herein by the Honorable Francis A. Garrecht, Judge of the above entitled court, on the 18th day of August, 1947, in order to allow for the preparation, certification and transmittal to the above-entitled court of the additional matters required by said additional appellants; and for good cause shown;

Now, Therefore, the above-entitled Court, on its own motion, does hereby extend the time for preparation and docketing of the additional record on appeal in said cause for a period of 40 days from date of filing this order within which to certify and transmit the same by the Clerk of [120] the United States District Court for the Eastern District of Washington, Southern Division; and

It Is Further Ordered that a copy of this order, duly attested, be transmitted to the Clerk of the said District Court.

Dated this 29th day of September, 1947.

WILLIAM DENMAN,

Judge of the above-entitled  
Court.

[Endorsed]: Filed Sept. 29, 1947. Paul P. O'Brien, Clerk.

A true copy.

Attest: Sept. 29, 1947. /s/ Paul P. O'Brien, Clerk.

[Endorsed]: Filed U.S.D.C. Oct. 2, 1947. [121]

In the District Court of the United States for the  
Eastern District of Washington, Southern  
Division

Civil No. 246

THE UNITED STATES OF AMERICA for the  
use of M. C. SCHAEFER, an individual doing  
business as Concrete Construction Company,  
Plaintiff,

vs.

SAM MACRI, DON MACRI, JOE MACRI, A. J.  
GOERIG and CLYDE PHILP, individuals  
and co-partners doing business as Macri Com-  
pany, and CONTINENTAL CASUALTY  
COMPANY, a corporation,  
Defendants.

## RECORD OF PROCEEDINGS AT THE TRIAL

Before: Honorable Sam M. Driver,  
United States District Judge.

### Appearances:

Harry L. Olson, of Yakima, Washington, for  
plaintiff.

Tom W. Holman, of Seattle, Washington, for de-  
fendants Macri.

Kenneth C. Hawkins, of Yakima, Washington,  
for defendants Goerig and Philp.

Eugene D. Ivy, of Yakima, Washington, for de-  
fendant Continental Casualty Company. [122]

Be It Remembered, that on the 24th day of Feb-  
ruary, 1947, the above entitled cause came regularly



on for trial in the above Court at Yakima, Washington, before the Honorable Sam M. Driver, Judge of said Court, sitting without a jury; the plaintiff appearing by Harry L. Olson, of Yakima, Washington; the defendants Sam Macri, Don Macri, and Joe Macri appearing by Tom W. Holman, of Brethorst, Holman, Fowler and Dewar, of Seattle, Washington; the defendants A. J. Goerig and Clyde Philp appearing by Kenneth C. Hawkins, of Brown and Hawkins, of Yakima, Washington; and the defendant Continental Casualty Company, a corporation, appearing by Eugene D. Ivy, of [123] Yakima, Washington;

Whereupon, the following proceedings were had and done, to-wit:

(Mr. Olson on behalf of the plaintiff waived his demand for a jury trial, and the case proceeded to trial before the Court without a jury.)

Mr. Holman: For the purpose of the record, in connection with the five cases, 250, 251, 257, 267, and there is one other, I don't recall the number, and this case, and in connection with the matter of the question which was asked Mr. Macri as to a claim made against the government for losses, after a protracted long distance conversation which I finally was able to make last evening, I find that the firm of Depew and Ferguson of Seattle are the ones that made the claim, and in that connection, at my request, this morning they have sent this

telegram, which was my suggestion as the best way to get the information to the Court.

The Court: Have you seen this telegram, Mr. Hawkins?

Mr. Hawkins: Yes, I have, your Honor. I might state that Mr. Goerig is bringing a copy of that claim and also a copy of the assignment, from Mr. Henry's office this afternoon; probably be here about two or three o'clock. [124]

Mr. Holman: Similarly, your Honor, with respect to the question of the assignment made by Mr. Macri, I also talked with Mr. Henry last night and he promised to send some wire this morning that I could present to your Honor.

The Court: Just so I get it before this case is concluded.

Mr. Holman: One other thing, your Honor; Mr. Olson and I both concur that Mr. Pease, the head of the Reclamation Office, who was subpoenaed by me and is here this morning, I had the subpoena set for the 24th figuring we would be ready to go, has charge of the entire work here, and his proof is formal only, and I wonder if everybody would concede and waive everything ahead, and let this witness testify?

Mr. Olson: Do you want to put it in before our opening statement?

Mr. Holman: I think you can make your statement if you wish.

Mr. Olson: I would just as soon put him on first, if you want to. I'm not going to make a lengthy statement.

The Court: Before we proceed with the opening statement I think it would be helpful to state your positions, so any statements counsel may make will be [125] brought out. Also, as to the mechanics, we really have, so far as Schaefer and Macri is concerned, two lawsuits in one here. Is there any thought of separating those? I suppose your evidence will be inter-related so that many witnesses will testify as to both of them?

Mr. Holman: That's right.

The Court: Well, we'll just proceed, then, and try to keep them as straight as we can. I think it would be helpful to be sure to have your witnesses testify which specification this relates to, if there is any doubt about it.

(Whereupon, Mr. Olson made an opening statement to the Court on behalf of the plaintiff.)

(Whereupon, Mr. Holman made an opening statement to the Court on behalf of the defendants, Macri.)

(Whereupon, Mr. Hawkins announced that he was reserving his statement on behalf of the defendants Goerig and Philp until the conclusion of the plaintiff's case.)

(Whereupon, Mr. Ivy made an opening statement to the Court on behalf of the defendant Continental Casualty Company.)

The Court: We will recess for a few minutes, and then you can put on your witness out of order, Mr. Holman. [126]

(Short recess.)

(All parties present as before, and the trial was resumed.)

Mr. Holman: May I call Mr. Pease, your Honor?

The Court: Yes, you may call him now. I assume there will be a considerable number of exhibits in this case, and we decided this would be a good time to try out the method of using consecutive numerical numbers for the exhibits, regardless of whoever introduces them. The exhibits will run from 1 up, and then we will specify which party has introduced it. I understand this is a witness for the defendants Macri, called out of order for convenience?

Mr. Holman: That is right.

### H. W. PEASE

called as a witness on behalf of the defendants Macri, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Holman:

Q. Your name, your place of residence, and your official occupation with the Bureau of Reclamation?

A. My name is Harold W. Pease, my place of residence is 608 South 19th Avenue, Yakima, and

(Testimony of H. W. Pease.)

I am construction engineer for the Roza Division of the Yakima Project.

Q. Mr. Pease, in that capacity you have in your official possession certain of the documents pertaining to [127] specification 1062, subdivision 1, and 1068 on the Roza Project, have you not?

A. I have.

Q. And you brought those with you?

A. I did.

Q. Now, are those official government records and documents?           A. They are.

Mr. Holman: Your Honor, and counsel, all counsel, I am wondering if it would be satisfactory to the Court and appropriate as between ourselves to have those documents identified, and when introduced, then retained for the purpose of trial, but with the requirement that we may substitute copies, so that the government will not be deprived of their original records.

The Court: Yes, I see no reason why that could not be done. There is no question of genuineness of signatures, I assume. Is there any objection? It will be understood, then, that as to all documents identified by this witness, the originals may be withdrawn and copies substituted.

(Testimony of H. W. Pease.)

Direct Examination  
(Continued)

By Mr. Holman:

Q. Now, under your Bureau regulations, that may be done without conflict with your office?

A. So far as I know, yes.

Q. Well, then, Mr. Pease, may I assist you to present the [128] various documents to be identified? You were subpoenaed by the defendant, Mr. Pease. Would you produce your copy of the subpoena and with reference to the various documents referred to there, present them, so that they may be marked?

A. Well, the first that is called for under 1062 is the daily reports of inspectors.

The Court: I just had this thought; these documents here that are involved in this case, and also in the others tried before, it would be more convenient for the Court, I think, if they were numbered first, and I would know always where to find them; they would be at the beginning of this long list, and is there any objection to our marking these consecutively as they were offered in the pretrial conference, and then they can be offered later?

Mr. Holman: No objection.

The Court: Then we can number these Mr. Holman is about to introduce where these leave off. That doesn't mean they will be admitted now. They will be numbered, and they can be offered later.



(Testimony of H. W. Pease.)

(Whereupon, contract and bond #1062 was marked Plaintiff's Exhibit No. 1 for identification.

(Whereupon, contract and bond #1068 was marked Plaintiff's Exhibit No. 2 for identification. [129]

(Whereupon, specification #1062 was marked Plaintiff's Exhibit No. 3 for identification.

(Whereupon, specification #1068 was marked Plaintiff's Exhibit No. 4 for identification.

(Whereupon, subcontract on specification #1062 was marked Plaintiff's Exhibit No. 5 for identification.

(Whereupon, subcontract on specification #1068 was marked Plaintiff's Exhibit No. 6 for identification.

(Whereupon, Joint Venture Agreement on #1062 was marked Defendant Macris' Exhibit No. 7 for identification.

(Whereupon, Joint Venture Agreement on #1068 was marked Defendant Macris' Exhibit No. 8 for identification.

(Whereupon, Termination of Joint Venture Agreements was marked Defendants Goerig and Philp's Exhibit No. 9 for identification.

(Whereupon, Application for bond on #1062 was marked Defendant Casualty Company's Exhibit No. 10 for identification.

(Whereupon, Application for bond on #1068 was marked Defendant Casualty Company's Exhibit No. 11 for identification.

(Testimony of H. W. Pease.)

(Whereupon, Structure Layout Specification #1062 was marked Plaintiff's Exhibit No. 12 for identification.) [130]

Mr. Holman: May it be stipulated that throughout the record here, where we speak of 1062, we are identifying 1062, Schedule 1, only?

Mr. Olson: That's right.

Mr. Holman: It will just save a lot of talk, your Honor.

Mr. Olson: I agree with counsel, and so stipulate.

(Whereupon, the reporter read the last previous question.)

A. The first thing on this is daily reports of inspectors on said contract, that's 1062. Here are the daily reports of inspectors.

Mr. Holman: I ask that that be marked for identification, your Honor.

The Court: Do you want it all marked as one identification?

Mr. Holman: Yes. Actually, as a practical proposition, counsel and the Court, there will be reference to only the portions that pertain to Schedule 12 and excavation, out of those.

(Whereupon, Daily Inspection Reports, #1062, was marked Defendant Macri's Exhibit No. 13 for identification.)

A. Then monthly estimates of progress for compensation.

(Testimony of H. W. Pease.)

Q. On 1062? [131]

A. 1062; these are all 1062 until further notice.

Mr. Holman: I ask that it be marked the next number, please.

(Whereupon, Monthly Estimate of Progress for Compensation was marked Defendant Macri's Exhibit No. 14 for identification.)

A. Payrolls of the Macri Company, principal contractor, and M. C. Schaefer, doing business as Concrete Construction Company as sub-contractor, still on 1062.

Q. First will be the Macri payrolls.

A. Here is Macri payrolls.

(Whereupon, Macri weekly payroll reports was marked Defendant Macri's Exhibit No. 15 for identification.)

A. And here's the Concrete Construction Company payrolls.

Q. That is the Schaefer payrolls?

A. Schaefer, Concrete Construction.

(Whereupon, Schaefer weekly payroll reports was marked Defendant Macri's Exhibit No. 16 for identification.)

A. Then the monthly concrete control reports for the period from April, 1944, through April, 1945, which are in here, with other concrete control reports to bring it up to date.

(Whereupon, Monthly Concrete [132] Control report #1062 and #1068 was marked

(Testimony of H. W. Pease.)

Defendant Macri's Exhibit No. 17 for identification.)

The Court: Just a minute, please. What did you say this was?

A. That is monthly concrete control reports. It covers much more than the period asked for; and concrete inspectors' daily reports from XD 1975, for specifications 1062-1, as filed in the Sunnyside office.

Q. Would you give that XD number, please?

A. XD 1975.

(Whereupon, Concrete Inspectors' Daily reports, #1062, was marked Defendant Macri's Exhibit No. 18 for identification.)

A. Then, for specifications 1068, first, daily reports of inspectors on said contract.

The Court: That's number 1068?

A. Yes, sir.

(Whereupon, Daily inspection reports on #1068 was marked Defendant Macri's Exhibit No. 19 for identification.)

A. Monthly estimates of progress for compensation.

(Whereupon, Monthly estimates of progress for compensation on #1068 was marked Defendant Macri's Exhibit No. 20 for identification.) [133]

The Court: Is that on 1068?

A. Yes.

(Testimony of H. W. Pease.)

The Court: You will continue on 1068 until you tell us to the contrary, is that understood?

A. Yes; then payrolls of Macri and Company.

(Whereupon, Macri weekly payroll report on specification 1068 was marked Defendant Macri's Exhibit No. 21 for identification.)

A. Monthly concrete control reports for the months during which said contract was in stage of performance—which are contained in this file.

Q. That would be contained in the identification 18——

Clerk: 17.

Q. Yes, thank you. Why couldn't 17, your Honor, be marked both 1062 and 1068?

The Court: Are all of those monthly concrete reports in that file that is marked 17?

Mr. Holman: They are, your Honor.

The Court: I don't see any sense of giving it two numbers, though. It will be understood that that identification 17 covers the monthly concrete reports for both 1062 and 1068.

Mr. Holman: That's right.

The Court: And it covers April, 1944 to April, 1945. [134]

Witness: Actually the last one in here is February 6, 1947, and I don't know what the earliest date is.

The Court: It more than covers the period involved here?

A. It more than covers the period involved. February 8, 1941, is when it starts.

(Testimony of H. W. Pease.)

The Court: It is understood, then, that Macri's Identification 17 covers both specifications 1062 and 1068.

Q. (By Mr. Holman): Did you bring a monthly estimate of progress for compensation, for 1068?

A. Yes. I don't remember which one that is.

Q. That's all right; I have it.

Clerk: It is number 20.

A. Number 20.

Q. Now, Mr. Pease, will you please state whether or not you were in charge of the principal office for this work on the Roza Project as encompassed within 1062 and 1068 during its performance, or were you away?

A. I was not here at that time.

Mr. Holman: I think that's all, counsel. I will have other government witnesses who were here.

Mr. Olson: I would like to ask a couple of questions. These concrete control reports, what do they purport to show? [135]

Mr. Holman: Well, if you want that, I would like to continue with direct, then. I'll save a lot of time for you.

Mr. Olson: I don't care.

Mr. Holman: I will continue my direct examination.

Direct Examination

(Continued)

By Mr. Holman:

Q. Will you then now, please, Mr. Pease, starting out with the first one marked, which was 13,



(Testimony of H. W. Pease.)

just briefly tell the Court the function of those in connection with the office of the Bureau of Reclamation, and go on down through the list, just for the purpose of the record?

A. Well, each inspector turns in a daily inspection report. The report is headed "Inspector's Daily Report" and at the top of it it shows the shift, the hours of work, foreman, date, station, and the specification, the equipment, the accomplishment, the remarks, if any, and the inspector's name at the bottom. That is shown in these inspection reports regardless of the type of work being done.

Q. Thank you. Now, that is a report from whom to whom?

A. That is the report from the inspector in the field where the job is going on, to the office.

Q. Thank you; and what would that office be? Would you call that the District Office, or what is the name of it?

A. It is the construction office, the Division Office, so [136] called because the work is being done on the Roza Division of the Yakima Project.

Q. All right, thank you, sir. Then what with respect to 14, the estimate of progress for compensation?

A. This shows by items the estimate number, the contractor, the specifications number, the month, the contract symbol number, and the date of the contract, then is tabulated below and on succeeding pages the various items of work accomplished dur-

(Testimony of H. W. Pease.)

ing that month, the work accomplished, that is, the quantities, payment quantities, during the previous month, the total to date, the unit of measurement, the unit price, and then the total earned.

Q. And does it also show deductions, if any, that are made? A. The which?

Q. Does it also show if there are any deductions made?

A. Yes, on page 2 there's a sub-total, then it shows the gross amount earned, the amount retained under the contract, the previous payments, if any, previous deductions, deductions this month, total deductions, and amount due.

Q. You say the amount retained under the contract; was that at a fixed percentage?

A. That is.

Q. What?

A. I believe it is 10 per cent. In other words, it will be provided, it is provided, in the specifications, and I [137] believe also in the contract.

Q. Mr. Pease, is that what is commonly known as the retained percentage in contracts?

A. Yes, it is.

Q. Would you then take up with respect to Macri's 15?

A. This is a certified copy of the payroll, the top one appearing to be number 59, for the week ending April 18, 1945.

Mr. Olson: This is Macri's payroll?

A. That is Macri's payroll. I assume that they are all here.

(Testimony of H. W. Pease.)

The Court: How often are those reports put in?

A. These are weekly. It requires under the contract that the contractors pay the employees weekly.

Q. Mr. Pease, in furtherance of your office reception and filing of payrolls, certified payrolls, what is the purpose for your office, with respect to them?

A. The payrolls are filed in conformity with a provision of the specifications, for checking to ascertain that the contractor is not paying less than prescribed minimum wages as set forth in the specifications.

Q. Any other function?

A. Not so far as I know.

Q. Then, would that hold true also for the other payrolls that you've put in, in each instance it would be the same thing? [138]

A. Yes.

Q. In other words, I'm talking now about the Schaefer payrolls, number 16, which is a sub-contractor's payroll. That would be the same purpose, would it not? A. Same purpose.

Q. Would it have any other purpose?

A. Not so far as I know.

Q. And that would also be true as to Macri's payroll on 1068. Then what with respect to Exhibit 17, Mr. Pease? A. What is that?

The Court: That is the concrete control reports.

A. All right. This is Concrete Construction Company. He mentioned this. It is the self-same purpose as the other.

(Testimony of H. W. Pease.)

The Court: You spoke of the Macri payroll, but I notice it is entitled "Sub-contractor payroll".

Q. We covered that; that's 16.

A. What was your question about this concrete control report?

Q. Would you make the same explanation with respect to those?

A. That is simply to show with relation to the concrete placed each month a summary of the concrete placed and the operations that were performed during the month, not in detail, but in general.

Q. Now, are those originals or copies of reports that have been sent from the division office to other offices?

A. These are carbon copies, the originals having been sent [139] to the Chief Engineer at Denver.

Q. And where would he be?

A. At Denver.

Q. Thank you. Then 18, please, would you make your explanation as to it, along the same line? Concrete Inspector's Daily, XD 1975.

Mr. Olson: Would you give me the title of that, please? I didn't get it before, the way you did before.

A. I'll find XD 1975 first.

Q. It is printed on the form, as I remember it.

A. Yes, it is, down on the lower left hand corner. Most numbers are not. This is Concrete Inspector's Daily Report. It shows the project and the feature, the contractor, the shift, mixer,

(Testimony of H. W. Pease.)

type of make, and various other things here. I doubt very much if you would be interested in everything that shows on it.

Mr. Olson: That XD is what was bothering me.

A. Don't ask me why; I don't know. It's just a designation.

Mr. Olson: It doesn't designate any particular structure, then?

A. No, it is a form number.

Q. Then with reference to those entries at the right hand side of the blank tabulation form, where cubic yardage is shown, what is the purpose of that?

A. This is the amount that passed through the mixer. [140]

Q. Would you amplify that just a little; "Passed through the mixer"; what does that mean?

A. There, for some reason unknown to me entirely, is always an over-run in quantity passed through the mixer over what the pay quantities are; it may be due to any one of a whole lot of causes.

Q. So that is not a computation for purpose of determining pay at all?      A. No.

Q. Thank you very much.

A. It is for calculation of over-run, if any.

Q. May I indicate to the Court from this exhibit here that purpose? This cubic yards, your Honor, for the first shift was 5.379. Those are the items I'm speaking of.

(Testimony of H. W. Pease.)

The Court: That is on the right hand column of the sheet. Yes, I see.

Q. Then would you make your explanation with respect to Macri's 19 for identification?

A. This is a similar sheet of inspection reports, daily inspector's reports, for 1068, to that for 1062.

Q. Same purpose as you explained for 1062?

A. Same purpose.

Mr. Holman: I think that's all. Now, Mr. Olson.

Mr. Olson: Now I have no questions.

Mr. Holman: May the witness, your Honor, be [141] excused, with the consent of counsel?

The Court: Is there any objection?

Mr. Olson: I'm not sure that I have all these identifications. 21, as I understand, is Macri's payroll. What is 20?

Witness: Monthly estimate of progress for compensation on 1068.

Mr. Olson: I have no objection to Mr. Pease being excused, subject to call.

The Court: Are you stationed here, Mr. Pease?

Witness: Yes, but sometimes I'm not; I'm pretty hard to find, if you wanted me. If you can let me know in advance——

Mr. Holman: His office is within two blocks of here, and if we could notify him previously, he could be here the next day.

Witness: I could be here the next day, barring unforeseen happenings like a broken ditch, or something like that.



(Testimony of H. W. Pease.)

Mr. Holman: If that may be understood, then that will be all.

The Court: You hadn't planned any extended trip during the next week?

Witness: No, but I might be going down to see what is going on on some of the contracts. [142]

The Court: Well, it is understood that reasonable notice will be given to you, at least a day in advance, so that you can arrange your plans.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Olson: Well, let's offer some of these exhibits.

Mr. Hawkins: I have only one question to ask concerning these exhibits. Who's going to assume the burden of making the copies?

The Court: That thought occurred to me. In case of appeal the Clerk makes copies of the exhibits to send up, ordinarily, to the Circuit Court of Appeals, but that is at the cost of the appellant, and I should think from a practical standpoint it would be wise to introduce only such of these as you plan to use, otherwise the bill for copying them would be very substantial indeed. I see what you had in mind, too, other than the matter of appeal. The government wants these originals back, and somebody will have to make copies to put in here so these can be released, whether there is an appeal or not.

Mr. Olson: I think it will develop there is a great bulk in here that will never be used, that is,

these daily inspection reports, the remarks that are made as to excavation are surprisingly lacking.

Mr. Holman: That's what I was going to say, if we could all stipulate that we can use these government exhibits without formally offering them, except insofar as we wish to substitute copies; then I think it would save a great deal of time; for instance, these payrolls.

The Court: Do you have copies ready of the ones that you want to use?

Mr. Holman: No.

Mr. Hawkins: I think the one offering the particular exhibit should make the copies.

The Court: I think that's fair enough.

Mr. Hawkins: That is, that big file there, if you're only going to offer five sheets out of it, we can all understand it comes from their original records, but only those five sheets are material.

Mr. Holman: In view of the fact there is no jury here, I might suggest the practical way would be to read from that into the record.

The Court: Well, in some instances that could be done, but where you have voluminous exhibits with figures in them, it wouldn't be practical.

Mr. Olson: I don't think we'll run into that very much. That would be the natural reaction from seeing that bulk of exhibits.

The Court: I think we should try to minimize using [144] these records as much as we can, and where we do, the one who offers will have the re-

sponsibility of reading into the record, if practical, or furnishing a copy if not; is that understood?

Mr. Holman: That is entirely satisfactory.

Mr. Olson: Plaintiff offers in evidence Plaintiff's Identification 1, being the certified copy of the main contract, 12R14825, and bond, covering specifications 1062.

The Court: Any objection?

Mr. Hawkins: No objection.

Mr. Holman: Not at all, your Honor.

The Court: It will be admitted.

(Whereupon, Plaintiff's Exhibit No. 1 for identification was admitted in evidence.)

Mr. Olson: The plaintiff offers in evidence Plaintiff's Identification 2, being the contract number 12R14996 between the Department of the Interior and the Macri Company, together with bond, covering specifications number 1068.

The Court: It will be admitted. I will assume as to these identifications that come from the pre-trial conference, unless counsel wants to make a specific objection I'll assume that there is none. Just speak up if there is. [145]

(Whereupon, Plaintiff's Exhibit No. 2 for identification was admitted in evidence.)

Mr. Olson: Plaintiff offers in evidence plaintiff's identification 3, Bureau of Reclamation specifications number 1062, covering earthwork, pipe lines and structures, laterals 59.3 to 59.8 and sub-laterals.

Mr. Holman: May it be stipulated, counsel, that the markings and underscoring in this should be disregarded by the Court?

Mr. Olson: I wouldn't want to stipulate that the Court disregard those matters underlined.

Mr. Holman: For instance, on page 1, your Honor, a lot of tabulations and the schedule is not filled out, which is shown in the contract anyway.

Mr. Olson: These figures that are written in here should be disregarded.

Mr. Holman: I object to this as not a complete copy of the specifications, until counsel puts in the bid amounts, the quantities, and the figure. They are blank. He can do that during the noon hour.

Mr. Olson: I have no objection if counsel wants to put those in, your Honor, for his doing so, but the specifications themselves covering this job are not—the amounts that Mr. Macri bid have got nothing to do with how the job is to be performed. If counsel's got a [146] completed copy of that, I've got no objection to it going in, if he wants it.

The Court: Well, I think it should be completed.

Mr. Holman: I'll be glad to have you complete it off of this. Subject to that, I will have no objection. I'll be glad to help you.

Mr. Olson: Well, that's a pretty fair deal. I am offering it for the purpose of showing what kind of excavations were to be made.

The Court: You had better fill those in, and renew the offer. The same would apply to identification 4, then.

Mr. Olson: Do you have the figures on that?

Mr. Holman: Yes.

Mr. Olson: Well, your Honor, I wonder if it could be admitted? Certainly they are admissible, when they were handed out to these people to show what they were to do.

Mr. Holman: If counsel wants to have them admitted as the specifications which controlled Schaefer's operations, I have no objection.

The Court: They will be admitted, and then if you wish to use those figures, they can be put in.

Mr. Olson: I'm perfectly willing they can be put in. [147]

Mr. Holman: And may I also have the undertaking from counsel that they will be cleaned up with regard to pencil notations on them?

The Court: I think those pencil notations could be erased. There aren't many of them, are there?

Mr. Holman: I don't think so, your Honor.

The Court: With that understanding, 3 and 4 will be admitted.

(Whereupon, Plaintiff's Exhibit No. 3 for identification was admitted in evidence.

(Whereupon, Plaintiff's Exhibit No. 4 for identification was admitted in evidence.)

Mr. Olson: Plaintiff offers in evidence identification 5, being the sub-contract between Macri and Schaefer covering a portion of specifications 1062.

The Court: It will be admitted.

(Whereupon, Plaintiff's Exhibit No. 5 for identification was admitted in evidence.)

Mr. Olson: Plaintiff offers in evidence plaintiff's identification 6, being the sub-contract between Macri and Company and the Concrete Construction Company covering a portion of specifications 1068.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibit No. 6 for identification was admitted in evidence.) [148]

Mr. Holman: Defendants Macri, your Honor, offer in evidence Macri's Identification 7, joint venture agreement on 1062.

Mr. Hawkins: Your Honor, the defendants Goerig & Philp object to the introduction of exhibit 7 into evidence. I notice it is 12 o'clock. Do you want to hear my objections at this time?

The Court: Well, I think we will recess until 1:30.

(Whereupon, the Court took a recess in this cause until 1:30 o'clock p.m.)

---

Yakima, Washington, February 24, 1947

1:30 o'Clock P.M.

(All parties present as before, and the trial was resumed.)

Mr. Holman: Your Honor, I was offering Macri's 7, and Mr. Hawkins indicated he would



have an objection, so I would like to also make an offer of Macri's 8, because I know his objection will run to both of them.

The Court: Yes, his objection will pertain to both of them, I assume.

Mr. Hawkins: Your Honor, the defendants Goerig and Philp object to the introduction into evidence of Exhibits 7 and 8 for identification. These exhibits constitute the joint venture agreements between the [149] Macris and Goerig and Philp. We object to the introduction of these in evidence for the reason that they are supplanted by Exhibit 9, the termination agreement, that takes the place of the joint venture agreements completely, and all of the rights of the parties arising out of the joint venture agreement are terminated and ended and modified, certainly, by the termination agreement, and it is the termination agreement alone on which the plaintiff or the defendants, under cross-complaints, can create any rights. We object to the introduction of those agreements in evidence, for the reason that they are incompetent and immaterial.

The Court: The objection will be overruled. I think the documents should all be in before the Court and construed together. Macri's 7 and 8 will be admitted.

(Whereupon, Defendant Macri's Exhibit No. 7 for identification was admitted in evidence.)

(Whereupon, Defendant Macri's Exhibit No. 8 for identification was admitted in evidence.)

Mr. Hawkins: At this time, your Honor, the defendants Goerig and Philp offer in evidence Exhibit 9 for identification, the termination agreement.

The Court: It will be admitted.

(Whereupon, Defendants Goerig and Philp's Exhibit No. 9 for identification was admitted in evidence.) [150]

Mr. Olson: I think the record should show that the use plaintiff objects to its introduction on the ground that it is immaterial and has no binding effect on the use plaintiff, he not being a party to the document.

The Court: Yes, the record may show that. I will withdraw the admission and permit the objection to be put in ahead of the admission. It will now be admitted. The next two are the Continental Casualty Company exhibits. I assume Mr. Ivy will probably offer those later on. He had to go over to Superior Court, I understand, for a while, and we're to proceed in his absence. He'll be back after while.

Mr. Olson: Are you going to offer 12, then, Mr. Holman?

Mr. Holman: No. These will take evidence, from here on.

The Court: 12 is the layout. You're not ready for that yet, are you?

Mr. Holman: No, sir. Anything from here on down, I'll have to offer evidence.

The Court: You may as well proceed with your case, then.

Mr. Olson: Unless no one else has any objection to it.

Mr. Holman: Well, if it will accommodate you, fine, [151] put it in as your exhibit if you want.

The Court: You wanted the structure lay-out, Macri's 12, in evidence as to Schaefer in connection with your case?

Mr. Olson: Yes.

The Court: Is there any objection to it, Mr. Holman?

Mr. Holman: Not at all, your Honor.

The Court: It will be admitted in evidence, then, if there is no objection to it.

(Whereupon, the Structure Layout, Specification 1062, was admitted in evidence as Plaintiff's Exhibit 12.) [152]

### M. C. SCHAEFER

the plaintiff, called as a witness in his own behalf, being first duly sworn, testified as follows:

### Direct Examination

By Mr. Olson:

Q. State your name, please.

A. M. C. Schaefer.

Q. Where do you reside?

A. Portland, Oregon.

Q. Are you the M. C. Schaefer on whose behalf this action is brought as plaintiff? A. I am.

Q. And what connection do you have, if any, with the Concrete Construction Company?

A. I'm the sole owner.

(Testimony of M. C. Schaefer.)

Mr. Holman: I want to object, your Honor, and it is purely a technical question; I would like to ask the witness a question, if I may, before that answer.

The Court: All right.

Mr. Holman: Have you filed a certificate of assumed trade name in Yakima County?

Witness: I have not [153]

Mr. Holman: I object to the answer to the question, then, your Honor.

The Court: I will overrule it. I don't believe that—is it your position, Mr. Holman, that filing a trade name is a condition precedent to bringing a suit in the Federal Court?

Mr. Holman: My position, your Honor, is that the Washington statute, the section of which I can cite you; I know your Honor is familiar with the section.

The Court: Yes.

Mr. Holman: Requiring when any person uses an assumed trade name, before he can sue with respect to that trade name he must comply with our statute, and Mr. Schaefer has shown by his answer that he has not complied and I think therefore he's estopped to proceed in this action, and that is not required, your Honor, as a matter of affirmative defense.

Mr. Hawkins: The defendants Goerig and Philp join in that motion.

The Court: I'll overrule the objection, and take up the question again in the final argument.

(Testimony of M. C. Schaefer.)

Mr. Holman: May I have an exception?

The Court: Yes.

Mr. Hawkins: If that's in the nature of an objection, I would like to put it in the form of a motion [154] for dismissal, because the witness's own testimony shows he's not entitled to maintain an action, and on behalf of the defendants Goerig and Philp I move that the action be dismissed.

Mr. Holman: I join in the motion.

The Court: The motion will be denied.

Mr. Holman: Exception.

The Court: Yes. It runs in my mind that the State statute provides specifically, does it not, that in order to maintain an action it will be necessary that one doing business under a trade name must first file the trade name. I think at some stage of this trial the question of whether that applies to a suit in Federal Court should be presented adequately. You may proceed.

(Whereupon, the reporter read the last previous question and answer on direct examination.)

Mr. Holman: I move the answer be stricken for the same reasons, also not the best evidence.

The Court: Overruled.

Mr. Holman: Exception.

The Court: Yes.

(Testimony of M. C. Schaefer.)

Direct Examination  
(Continued)

By Mr. Olson:

Q. You may answer, Mr. Schaefer.

A. I'm the sole owner.

Q. Where is the Concrete Construction Company's place of [155] business?

Mr. Holman: Same objection.

The Court: Same ruling.

Mr. Holman: Exception.

A. 1635 South East 11th Avenue, Portland, Oregon.

Q. Now, you are the M. C. Schaefer who signed the sub-contract on the job known as specifications 1602 of the Bureau of Reclamation? A. I am.

Q. Now, can you explain, Mr. Schaefer, generally, for the Court's information, what the job 1062 consisted of; not just the part that you were to do, but a general description of the project?

Mr. Holman: Well, just a minute, may it please the Court, I object to that, except just for graphic description, so that we're not bound by his description of the job. He's not shown competent, yet, and qualified.

The Court: Well, I presume it is preliminary in nature.

Mr. Olson: Yes, your Honor. I can see your Honor could sit down and read these specifications. We would have to recess, probably, for several hours.



(Testimony of M. C. Schaefer.)

Mr. Holman: I'll withdraw the objection, your Honor, to save time.

The Court: Yes, all right. [156]

Direct Examination  
(Continued)

By Mr. Olson:

Q. Mr. Schaefer, I'll withdraw the question for the time being, and ask you first what is the nature of your business?

A. Concrete and general construction.

Q. And how long have you been engaged in that business?

A. Well, I've been engaged in the construction business for approximately twenty-five years.

Q. And in connection with that business you make up bids and submit bids?

A. That's right.

Q. And interpret plans and specifications?

A. Yes.

Q. Now, are you familiar with the general scope of project or specifications 1062, that is involved here?

A. I am.

Q. Would you describe the project in general scope to the Court?

A. Well, more particularly as to the work that was to be done before we were to do our part of the construction work——

Mr. Holman: I move that that be stricken as not responsive.

(Testimony of M. C. Schaefer.)

The Court: It is not responsive. It will be stricken. The question was the general scope of the work [157] as a whole, I think.

A. Well, it's an irrigation project for the Bureau of Reclamation. The work involved was the excavating for ditches, excavating for pipe lines, placing of pipe, excavation for structures, placing of forms, the pouring of concrete in structures. The area involved I believe was in the neighborhood of forty miles of lateral. There was required that there be excavation, fine grading——

Mr. Holman: Just a minute, may it please the Court, I object to that type of answer as not the best evidence. The requirements are already in evidence as exhibits. If the witness is telling his own interpretation of it, that's one thing, but it certainly is not the best evidence.

Mr. Olson: Well, I hadn't asked for that just yet anyhow, but I will.

#### Direct Examination

(Continued)

By Mr. Olson:

Q. Now, with reference to specifications 1068, Mr. Schaefer, can you give us the general scope called for by those specifications?

A. It was the same general work as involved in 1062.

Q. And with reference to location, where was the area, the location or the situs where the work was to be performed in 1068 with reference to 1062?

A. It was next to it; it was a continuation, so to say. [158]

(Testimony of M. C. Schaefer.)

Q. And where was the general situs of the work—where is this work located, Mr. Schaefer, the situs of it? A. Near Sunnyside, Washington.

Q. Now, handing you plaintiff's Exhibit 5, Mr. Schaefer, which is the sub-contract covering 1062, would you tell the Court what was the nature of the work on 1062 that was to be performed by the Concrete Construction Company?

Mr. Holman: That I object to, your Honor. The document is the best evidence.

The Court: I will overrule the objection. I think I would like an explanation from the witness.

Witness: It was the doing of form work, the pouring of concrete, and the stripping of the forms, the furnishing of hardware, and the curing material was the only material that the Concrete Construction Company was to supply, and this work was in connection with the structure, chute, stilling pool, and separation structure.

Q. Referring to the sub-contract and to Article I, who was to furnish the form lumber?

Mr. Holman: Just a minute, your Honor. Purely the instrument speaks for itself there. I object to it. It seems to me that is for the Court to interpret from the wording of the instrument.

The Court: Yes, I think if there is any dispute about it. [159]

Mr. Olson: Well, I don't think there is, Mr. Holman, any dispute that Macri and Company—

Mr. Holman: The instrument speaks for itself.

(Testimony of M. C. Schaefer.)

The Court: I assume he was going to say Macri was going to furnish the lumber. If there is any question about that I'll have to read the contract.

Mr. Holman: No, there isn't. That's what he's going to say.

The Court: Perhaps we might save time here. The Court doesn't want to stop to read all these documents, and even if I did I wouldn't know what you wanted to call my attention to at the particular time. Why can't you call my attention to the portions you want, and then explain it as you go along, Mr. Olson?

Direct Examination  
(Continued)

By Mr. Olson:

Q. Well, reading from Article I, your Honor, of the contract, the sub-contract, on 1062, it provides that all materials except form wire, nails, and curing material will be furnished by the general contractor or/and owner. Sub-contractor will furnish the above wire, nails, and curing material. Now, what is the form wire; what is that, Mr. Schaefer?

A. Well, if any, there was very little form wire used. Wire ordinarily would be used in tying the forms. In this case the Bureau requested that we use she-bolts. [160]

Mr. Holman: I didn't hear that last.

The Court: In this case they used she-bolts.

(Testimony of M. C. Schaefer.)

Mr. Holman: I thought he said the Bureau requested it; is that right? A. That's right.

Q. Now, the nails that were to be furnished by you, what were they for?

A. They were for building the panels and assembling the structures in the field.

Q. And the curing material, what did that consist of?

A. Curing material was for sealing the concrete from too rapid evaporation of the water, and for use as protection against frost.

Q. Now, referring to the plaintiff's Exhibit 3, and on schedule 1, which of those items were sub-contracted to you by the sub-contract on 1062?

A. Item 12.

Q. And what is that item?

A. That is concrete in structures; item 13——

Q. What is that item?

A. That is placing re-inforcement bars.

Q. What does that consist of, Mr. Schaefer?

A. There were certain of the structures that were re-inforced, requiring re-inforcing steel.

Q. That is in the concrete itself? [161]

A. That's right.

Q. All right; now, any other items there?

A. Item 16, installing gates and miscellaneous metal work.

Q. And what does that consist of?

A. Well, that is gates.

Q. Well, for what purpose?

A. That is attached to the concrete structure for controlling the amount of water going through

(Testimony of M. C. Schaefer.)

the structure, and for measuring the quantity of water that the farmer uses.

Q. Now, what was necessary to be done in the performance or in the completion of this project, Mr. Schaefer, in order to place these structure forms in place for the pouring of concrete?

A. There was excavation and fine grading previous to our going in and setting our forms.

The Court: Will you read the answer?

(Whereupon, the reporter read the last previous answer.)

Q. Now, what do you mean by fine grading, Mr. Schaefer?

A. Fine grading is to get the ground elevation at proper grade to receive the forms or the bottom of the structures.

Q. Now, handing you plaintiff's Exhibit 4, can you refer to what page or section refers to the excavation work?

The Court: What was that number, plaintiffs——

Mr. Olson: 4. [162]

A. Item 45 on page 21, "Excavation for structures."

Q. Would you read the portion of that that refers to the excavations?

(Whereupon the witness read item 45 on page 21 of Exhibit 4.)

Q. That is section 45 commencing on page 21 of plaintiff's Exhibit 4 of specifications. I notice you



(Testimony of M. C. Schaefer.)

were reading from 1068. Maybe I handed you the wrong one. Do you know, Mr. Schaefer, whether those specifications on 1062 and 1068 are identical? Do you know, Mr. Holman?

Mr. Holman: I think they are. We can agree on it. You asked him to read from 1068, and I wondered why.

Mr. Olson: I intended to have him read from 1062.

Mr. Holman: They're paged just a little different, Mr. Olson, so I just can't answer you without reading one against the other.

Mr. Olson: Well, I want to have them both in the record anyway, because if we can't stipulate to it we'll have to read them. The documents speak for themselves, and I intend to have Mr. Schaefer explain them.

#### Direct Examination

(Continued)

By Mr. Olson:

Q. Handing you, then, plaintiff's Exhibit 3, would you read that portion of those specifications which refer to and describe the excavation to be done in the performance of the contract? [163]

The Court: Is there any contention those are not substantially the same?

Mr. Holman: I think not.

The Court: Well, let's let the record show it, then. We don't want to waste any time reading it.

Mr. Hawkins: Where is that to be found?

Witness: On page 22.

(Testimony of M. C. Schaefer.)

The Court: Of plaintiff's Exhibit 3?

Mr. Olson: The bottom of page 22, and it is section 47, your Honor, on Exhibit 3.

The Court: All right.

Mr. Holman: That's different numbering, you see; that's why I couldn't answer you.

Direct Examination  
(Continued)

By Mr. Olson:

Q. Mr. Schaefer, referring now to this language that says "Except to the limitations described above, excavation for structures will in general be measured for payment to lateral dimensions one foot outside the foundation of the structure and to a slope of 1 to 1 for common excavation"; now, would you explain that to the Court, what kind of an excavation that describes?

A. Well, that describes an excavation that is made to the bottom of the floor area, the different floor elevations, and at such elevation having a lateral dimension of one foot outside of the concrete, and from there to the surface of the ground the excavation is made on a 1 to 1 slope, or 45 degrees.

Q. A 1 to 1 slope means what, you say?

A. That means one foot out to one foot vertical.

Mr. Hawkins: That's a 45 degree angle, is it not?

A. That's right.

The Court: Is that one foot on each side?

(Testimony of M. C. Schaefer.)

A. That is all around the structure. That means one foot out and then on a 1 to 1 slope to the surface.

Q. Now, one foot out in what part of the structure?

A. One foot out at the base of the structure.

Q. Then the next part of the specifications, it says "one quarter to one for rock formation." Was there any of that type of excavation on the job?

A. Well, there was some rock excavation. I don't know as to the—that there was any of it done on that basis. The rock excavation was performed vertical, the same as the rest of the excavation.

Q. Now, the one quarter to one for rock excavation would mean what, specifically?

A. One quarter to one would be one quarter out, one quarter of a foot, to one foot of height, or in elevation.

Q. Now, the next provision provided that where the character of material cut into is such that it can be trimmed to the required lines of the concrete structure without the [165] use of intervening forms, payment will be made only for the excavation within the neat lines of the structure. First, what is meant by the "neat line"?

A. The neat line is the outside line of the concrete.

Q. Were there any of that type of excavation?

A. No, there were not.

(Testimony of M. C. Schaefer.)

Mr. Hawkins: I didn't hear the answer.

(Whereupon, the reporter read the last previous answer.)

Q. There were no excavations, then, that did not require an outside form to the concrete structure?

A. That is right.

Q. Now, it says that the—refers to dimensions and lines as staked out or otherwise established by the contracting officer. Now, what did the Bureau of Reclamation do, if anything, with reference to the staking out?

A. Well, they gave the lines at the head walls, and they gave the grade elevation for the height of the structure.

Q. And how did they do that? How was it shown out there on the job, so that we know what we're working on?

A. There were stakes placed by the Bureau engineers with measurements noted on them as to the distance from a particular stake to the center of the structure in each direction, or to the center of the head wall, and so the matter of taking two lines, you would get the, have the [166] proper lines to work from for laying out your structure.

Q. In other words, there were stakes out there where the excavation was to be made?

A. That's right.

Q. And data that gave the elevations?

A. Yes.

(Testimony of M. C. Schaefer.)

Q. Now, referring to the next part "The bottom and side slope of common excavation upon or against which concrete is to be placed shall be finished accurately by hand to the dimensions shown on the drawings." What does that refer to?

A. Well, that more particularly refers to certain type of structures that were in some of the ditches.

Q. Well, would that or would it not, Mr. Schaefer, have any reference to plaintiff's Exhibit 12?

A. It would.

Q. And would you explain what plaintiff's Exhibit 12 is, and how it was used? What was its purpose in performance of this work?

A. This shows the plans of the structures. This with other print also shows the station, so that you locate the place where each of these structures were to be placed.

(Whereupon, map of laterals with structure numbers was marked Plaintiff's Exhibit No. 22 for identification.) [167]

Q. Showing you plaintiff's identification 22, Mr. Schaefer, I'll ask you to explain what it is.

A. That is the map of the laterals and with the numbers of the structures noted thereon.

Q. Does this map also give certain numbers known as stations?

A. That's right.

Q. Now, the structure numbers that appear on this map were placed on it, if I may ask a leading question, counsel, after the map was issued by the Bureau of Reclamation?

A. That is right.

(Testimony of M. C. Schaefer.)

Q. The station numbers, however, that appear on here were part of the Bureau's records?

A. That's right.

Mr. Holman: May I ask a question, just to help the situation?

Mr. Olson: Yes.

Mr. Holman: If you will refer to sheet 1 of the specifications, is this identification that you now hold intended to be an enlargement of that, with the stations added? Is that the purpose?

A. This here, if it is the same area as this, then this here is an enlargement.

Mr. Holman: Well, may I inquire, was this received from the government, or did you make this map up?

A. No, this here was received from the government. [168]

Direct Examination  
(Continued)

By Mr. Olson:

Q. When you say "this here" you're referring to plaintiff's identification 22?

A. That's right.

Q. All right, now, Mr. Schaefer, can you explain to the Court how identification 22—well, first, I'll offer identification 22.

Mr. Holman: I object to it as not being sufficiently identified, for the reason that the stationing on there is not a government marking. That's



(Testimony of M. C. Schaefer.)

been put on not by this witness, but by someone else, is that correct?

Witness: No, the stations are marking by the government.

Mr. Holman: But the structures are put on by whom?

A. By Concrete Construction Company's superintendent on the job.

Mr. Holman: Who's that?

A. That is Pat Darcy.

Mr. Holman: I have no objection to it being admitted, subject to it being bound as to the stations.

Mr. Olson: Well, the stations are Bureau of Reclamation records, but the structure numbers are inserted by Mr. Darcy, and they're on there entirely for convenience of location, and I'm not offering it for the purpose of binding you to anything on that. I just merely want to [169] show that in order to perform this job how these records went together.

Mr. Hawkins: Your Honor, we object to the admission of that in evidence because there is no testimony that that map relates to any of the contracts or sub-contracts or specifications in evidence. If that is properly identified I don't see that it is material. That is in addition to counsel's objection.

Mr. Holman: Well, I would join in that, too. I thought the witness had answered me "Yes, it was this."

Mr. Hawkins: I understood him to say he didn't know.

(Testimony of M. C. Schaefer.)

Witness: If this covers the same area?

Mr. Holman: I object also. I misunderstood the answer.

Mr. Hawkins: We have certain contracts and certain specifications, and that is where we have to trace our liability.

The Court: It would have to be more specifically identified, then, if it is objected to.

Direct Examination

(Continued)

By Mr. Olson:

Q. Examine this and tell me whether or not it covers job 1062. If it doesn't, I don't want it in either.

Mr. Holman: If that's just what they call a "blow-up" of this, that's fine. [170]

The Court: He can't tell that, because he didn't prepare it. It is from the Bureau of Reclamation.

A. This here refers to 1062.

Q. Well, does it cover the area? A. Yes.

Q. And does it show the station?

A. It does.

Q. That refers to job 1062? A. It does.

The Court: Is all of the work under 1062 shown on that exhibit?

A. Yes.

The Court: What are the lateral numbers? Where do they come from?

Q. Would you explain to the Court, Mr. Schaefer, what these lateral numbers that appear on the specifications, what do they refer to?

(Testimony of M. C. Schaefer.)

A. They refer to the different laterals taking off of the main canal, and they are used for convenience in locating the structures on the job.

Q. Now, the purpose of the Bureau issuing this map in connection with this work is what? What does it show?

Mr. Hawkins: I object to that as purely hearsay.

The Court: The objection will be sustained to the form of the question. He wouldn't know what the [171] Bureau's purpose was. He can explain how the map is used.

Mr. Olson: Well, it's such a simple thing we're trying to show here, I don't see why counsel is objecting to it. Any objection to my asking a leading question?

Mr. Hawkins: My objection is that it is not tied in with the specifications whatever this may show. We don't know whether it covers any liability in this case.

The Court: He says now it is a map covering this particular project, 1062.

Mr. Hawkins: Going further, my point is that this witness does not know of his own knowledge that this accurately reflects the situation that exists with respect to 1062. It is merely a map prepared by someone else and given to him as a representation of 1062. Apparently that is as far as his testimony goes at this time. If he can just state that that is an enlargement of the drawing attached to the specifications, that's something else again. It

(Testimony of M. C. Schaefer.)

seems to me that it would be merely a matter of somebody taking a few minutes looking it over to see if that is true. If it is some other or different map, I think it is immaterial.

Mr. Holman: That is just the point I had, your Honor. If it is merely a "blow-up" for the purpose of this witness explaining something to the Court in trial, and it is not to be admitted, that is one thing. If it [172] is going to be admitted as a government document, then I want it authenticated before I can accept it without objecting.

Mr. Olson: Your Honor, it says right on it here that it is a United States Department of the Interior, Bureau of Reclamation, Yakima Project, Washington, Roza Division, Laterals 59.3 to 69.8 and sub-laterals, and diversion channels mile 38 to 49, which is the same as the specifications, and it is a location map. What I'm trying to show is that this is the map that told them where to go to make the excavations. That showed where it was. That's all I want to show about it.

The Court: Is it just an enlargement of the one Mr. Holman has?

Mr. Olson: It is to the best of my knowledge, your Honor. That's what it says it is, and that's what I've understood.

The Court: Would it be possible to compare those, Mr. Holman?

Mr. Holman: Yes. If I knew counsel's purpose, if counsel wants to put that up to have this witness explain some general characteristics, we have no

(Testimony of M. C. Schaefer.)

objection to it, whether he drew it, or counsel drew it, or anybody else, by way of illustration. If he's putting it in as an official document, I certainly object to it as not [173] sufficiently authenticated.

Mr. Olson: I'll state my purpose, your Honor. We have this exhibit 12, which is the structure layout, and which shows each structure to be installed, and also has a station number, so I'm offering 22, which is, as I understand it, if it isn't I'll withdraw it, an enlargement of the area map that is contained in the specifications, so that when one goes to this station, this 22, he can find a station on it, and then refer to the structural layout and see the type of the structure that's to be placed in that location. 22 shows where it is to be put, and Exhibit 12 shows what's to go there. 12 shows what's put there, and 22 shows where it goes, and the only purpose of it is so that your Honor will have that information and know whether one structure is in relation to the other. As I say, if it develops that's not an enlargement of what is in the specifications, I'll withdraw it. I so understand it to be.

Mr. Holman: I would just like to do 'most anything to expedite counsel's trial. If he merely wants to have this witness testify on that, without giving it the authenticity of an official document, then it is only a blow-up for that purpose, and I have no objection to that exhibit being introduced

(Testimony of M. C. Schaefer.)

in evidence, but when you try to tie the Bureau to it, I do object, without [174] authentication.

The Court: I think his purpose is to accurately place by use of this map the various stations referred to in the specifications. It is to place and locate on this map, which is plaintiff's identification 22, place and locate on this map the various stations that are referred to in the specifications, so it seems to me it would be going beyond simply illustrating the testimony of the witness, because he wants to place them on the ground so far as this map is concerned by reference to station numbers.

Mr. Holman: That may or may not become important in this case. If it does, then somebody should authenticate it by virtue of status and so forth. Another thing that disconcerts me is that the map has a statement behind here that I don't understand at all. Counsel, what are these hanging on the line?

Mr. Olson: I don't know, Mr. Holman.

### Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Schaefer, then, referring to plaintiff's Exhibit 12, would you explain to the Court what that exhibit is?

Mr. Holman: I think that's already been covered, your Honor, by the witness' answer; structure lay-out.



(Testimony of M. C. Schaefer.)

The Court: I don't know that he has. I'll permit him to answer. [175]

A. This is the prints by which the carpenters built the forms, built and set the forms. It is a structural lay-out.

The Court: That's 12, is it?

Q. Yes. You say that is the plans from which the carpenters built the structures?

A. That's right.

Q. What else could it be used for, if anything? What I'm trying to get at, Mr. Schaefer, how did these people digging these holes, how did they know what kind of a hole to dig, whether it went out this way or that way, how did they know that?

A. The parties doing the excavating also used them in the excavating.

Q. Used what? A. These prints.

Q. When you say "these prints" what do you refer to? A. The structural lay-out.

Q. Then, just for example, taking any one of those structures shown in the lay-out there, how would one determine, either the excavators making the excavation or the contractors building the forms, how would they know where on the project it was to be placed, the hole dug or the structure placed; how would they know that?

A. By use of the map showing the stations.

Q. And by map, what map do you mean?

A. I mean the map of the laterals attached to the specifications.

(Testimony of M. C. Schaefer.)

Q. Is that the map that is called the "location map" that appears immediately following page 36 on plaintiff's Exhibit 3? A. That is correct.

Mr. Holman: That is labeled drawing number 1, counsel. Each drawing is numbered.

Q. That's right. Now, what numbers or what name is there, then, that connects the structural lay-out and this drawing number 1, that identifies the location of the structure on the ground?

A. The station number.

Q. The station number. In other words, does each location have a station, a numbered station, on the location map, drawing 1? A. Yes.

Q. And on the plans and specifications, or the structural lay-out, does each one of those structures have a location number? A. They have.

Mr. Olson: Does your Honor wish to look at this map and follow it as we go along?

The Court: Yes, if you have another one there.

Mr. Olson: Well, I've got one that I'm satisfied with, if no one else is.

### Direct Examination

(Continued)

By Mr. Olson:

Q. Now, with reference to specifications 1068, Mr. Schaefer, without going into the same detail, is the same set-up on station numbers and plans and specifications true in that job as on 1062?

A. That is the same type of prints.

(Testimony of M. C. Schaefer.)

Q. Same general type?

A. Same general type, yes.

Q. With a location map of the station numbers?

A. Yes.

Q. Now, how did you first get in touch with Mr. Macri for this job, or he in touch with you?

A. We received a letter from Macri Company superintendent.

Q. And pursuant to receiving that letter did you ultimately enter into this, or go over the job and make this contract?      A. Yes.

Q. Sub-contract 1062. Now, when did you take over the work covered by your sub-contract on 1062?

A. We signed the contract on the 15th day of March, 1944. We assumed the payroll of two or three men then working on the job, and assumed that payroll as of March 13, 1944.

Q. So that when you signed the sub-contract what was the [178] situation with reference to job performance on 1062?

A. They had started to build structure form panels.

Q. Who had?      A. Macri Company.

Q. Macri Company; they had already started building structural forms?      A. That's right.

Q. Then you say you took over the payroll as of two days previous?      A. That's right.

Q. And what did you do then, if anything, Mr. Schaefer?

A. Well, we went ahead building form panels. We had figured that on the basis of Mr. Macri's

(Testimony of M. C. Schaefer.)

superintendent, that we would be pouring concrete in two to three weeks. That letter, I believe, was received on March 2. However, we didn't get to pouring any concrete until the last day of July, 1944.

Q. Were there any excavations made on March 13, '44, when you took this job over?

A. No, there weren't.

Q. Who was the foreman that you started out on the job? A. Fred Waltie.

Q. Spelled W-a-l-t-i-e? A. Correct.

Q. Now, was Mr. Macri then doing any excavating? [179]

Mr. Holman: Just a minute, your Honor. I would suggest that counsel doesn't lead. That question hardly offends, but at least let the witness testify instead of answering yes and no. I'll not object to that question.

Q. Was Mr. Macri then excavating or performing excavations when you took over your performance on March 15, I believe you said it was?

Mr. Holman: I object to that question as leading, your Honor.

The Court: Well, he's already testified that there were no excavations at that time. I'll overrule the objection.

Q. Well, what was Mr. Macri doing at that time, Mr. Schaefer, that is, with reference to this job?

A. I'm not certain that they were doing clearing. I'm quite sure that they were not doing any excavating whatever on the job at that time.

(Testimony of M. C. Schaefer.)

Q. When did they start excavating?

Mr. Holman: I object as not the best evidence, your Honor. The government record is the best evidence.

The Court: Overruled.

Mr. Holman: Exception.

Q. If you know.

A. I'm not positive. I think I'd have to look at the record on that. [180]

Q. Well, have you got a record there that you have made, or Concrete Construction Company record from which you can tell that?

A. Yes, I believe I have it here.

Mr. Holman: May I inquire, counsel, whether this witness made the record, or is it his job record?

Q. Is this a record you made, Mr. Schaefer, or is it your foreman's?

A. This is a record made by the foreman.

Q. That's Mr. Waltie? A. That is right.

Q. And the record you referred to is one your foreman made, at any rate?

A. This here was copied from the daily reports.

Q. All right. Now, when were you on the job next after you took over the operations, Mr. Schaefer?

A. I believe we went over to the job on the day following the signing of the contract.

Q. All right, and on that day what did you see as far as excavations was concerned?

A. No excavations.

(Testimony of M. C. Schaefer.)

Q. All right, when were you on the job next? You can refer to any notations which you've made, if any, Mr. Schaefer, to ascertain these dates.

A. As to the exact date I do not know whether our daily [181] reports there would indicate it.

Q. Pardon?

A. I do not know whether our daily reports would indicate what the next day was at which I was over on the job. I was over at the job a number of times right successive there.

Q. Well, when did you first see some excavations there, do you know that?

A. The first excavations?

Q. That you saw yourself.

A. I believe that was April 18.

Q. Well, now, would you describe—who was with you at that time, do you know, Mr. Schaefer?

A. There was the men on the job. There wasn't anyone particularly with me at the time.

Q. And can you describe the excavations that you saw that day?

A. The excavations were made vertical. There was no one to one slope. They were made tight.

Q. Were there any structures in place on this April 18 date?

A. Yes, we had set a few structures at that time, I believe.

Mr. Hawkins: I can't hear the witness.

The Court: Speak up a little louder.

A. I believe we had a couple of structures in place at that time. [182]



(Testimony of M. C. Schaefer.)

Q. Explain what you mean by the excavations being "tight."

A. Well, they were just too tight to work in, to build forms.

Q. What do you mean by tight?

A. Well, anything less than, we'll say, a foot out, is really tight. All of the excavations there were tight, being that they weren't excavated over a foot out, and vertical, whereas they were called out for being excavated out a foot and on a 1 to 1 slope.

Mr. Holman: I move that last be stricken as a conclusion of the witness, your Honor. The specifications control.

The Court: Well, I'll let it stand for what it is worth. I know what the specifications are.

Mr. Holman: Exception, your Honor.

The Court: Yes, exception allowed.

#### Direct Examination

(Continued)

By Mr. Olson:

Q. All right, when were you next on the job, Mr. Schaefer?

A. I believe I'll wish to refer to the daily reports.

Q. You want a record that you don't have up there? Just tell Pat what you want.

A. Pat, I believe there is a small diary——

The Court: Well, we'll recess for ten minutes, and perhaps you can find what you want by then.

(Short recess.)

(All parties present as before, and the trial was resumed.) [183]

Mr. Holman: Your Honor, and counsel, I wonder if I could interpose a minute. I have a telegram from Mr. R. G. Newell of the Bureau of Reclamation at Boise, Idaho, that indicates it will be necessary to take the deposition of Mr. H. T. Nelson, the engineer in charge, and I would like at this time to make application that his deposition be taken and have a commission issued so [183A] that it can be made available here to your Honor in connection with the trial.

The Court: Where is he, at Denver?

Mr. Holman: No, at Boise, Idaho, your Honor. Off the record—I don't object to it being on the record, I understood that one of the men here died Saturday or Sunday, and there is to be a funeral some time here soon, one of the Bureau men, and that may have made a difference in the plans, I don't know.

The Court: Well, how do you propose to take a deposition now, Mr. Holman; by written interrogatories?

Mr. Holman: I would say oral interrogatories, your Honor.

The Court: How can that be done, and continue the trial here? I assume it is the same counsel.

Mr. Holman: Well, I had in mind that it could be taken at Boise, Idaho, possibly on Saturday.

The Court: Well, is there any objection to taking a deposition at this stage of the proceedings?

Mr. Olson: Very, very much. Mr. Nelson has been over in Boise, Idaho, for a long time, and counsel either knew it or could have ascertained that that is where Mr. Nelson resided. I have talked with Mr. Nelson myself and I also asked him if he'd come here, and he told me he wouldn't. As a matter of fact, he was in town here a few [184] days ago. It is a fact that Mr. Ball, the engineer here, passed away, and I wouldn't be surprised but what Mr. Nelson came here for the funeral, prior to this trial being over. If he is, of course counsel can subpoena him, but we certainly object to any continuance to take the deposition of Mr. Nelson at this time. There's no showing made whatever of any excuse for not having taken it sooner.

Mr. Holman: I expected Mr. Nelson to be here, your Honor. I talked with him.

The Court: I don't believe I would be justified in postponing this trial, or continuing it.

Mr. Holman: I don't ask that. I would ask during the progress of the trial to have the time to take the deposition, either on written or oral interrogatories. I am just faced with it now.

Mr. Hawkins: I understand the plaintiff has 20 witnesses; the defendant has a good many; at the rate we're going now I understand it will go over until next week.

The Court: Well, for one thing, I don't propose that this trial is going to move at the rate it is

moving today. It is going to move faster than that if I have anything to do with it, and I think I do. I've set aside one day next week for this trial, but I have another [185] following it with a large number of witnesses, some of them from Delaware. If this taking of a deposition meant considerable delay it would have to go over a month or so, and I don't think that is justified.

Mr. Holman: I wouldn't think so, your Honor. I would think that either on written interrogatories or oral deposition it would co-ordinate right with the trial.

The Court: It isn't necessary to get any commission to take the deposition, if it is in the United States here.

Mr. Holman: I understood that, your Honor. I just felt obligated to tell your Honor this when the telegram came to me, and to notify counsel that we want that done.

Mr. Olson: We're objecting to it, if the Court please. Mr. Nelson doesn't know anything all the other—as a matter of fact, he's the one to whom these field inspectors reported. The field inspectors are practically all available in the Bureau of Reclamation.

The Court: Had Mr. Nelson told you he was coming here?

Mr. Holman: Subject to permission of his superior, who was Mr. Newell, and Mr. Newell has by

this telegram told me he won't be here. I don't know but whether or not this death may have caused it.

The Court: This isn't a very timely application for his deposition, it seems to me, a case pending as long [186] as this one, coming in with an 11th hour request necessarily must disrupt this trial. I don't see how you can get a deposition or settle interrogatories and take the deposition and get it back by the time the trial closes, or should close, Monday or some time early next week.

Mr. Holman: I was with Mr. Nelson Saturday in Boise and at that time he planned to come.

The Court: At that time he planned to come here?

Mr. Holman: Subject to Mr. Newell's approval, and Mr. Newell has not approved.

The Court: What would he testify to if he got here?

Mr. Holman: Your Honor, he will testify to—and counsel may be willing to admit these things, I don't know—he would give complete qualifications; he would give authentication of the various maps and drawings——

The Court: What maps and drawings do you refer to?

Mr. Holman: With reference to the exhibits in evidence, as the specifications.

The Court: Well, they're already in evidence, aren't they? Do you require further authentication, if they're in evidence?

Mr. Holman: No, sir; I mean with reference to the job itself. I was just reading down over the notes that I had of what Mr. Nelson would cover, your Honor. He would explain with reference to the practical applications in [187] the Bureau office of items 5, and 8, and I probably can get that from even Mr. Pease, I presume. He was the actual engineer in charge, and had considerable inspection of this work, and I probably can cover that by other engineers, so it may be I'm not as badly hurt as I thought, but I would respectfully ask that my application for the taking of the deposition, instead of being denied at this time, if your Honor would allow it to stand, and when the case is further along. If it becomes evident that it is proper or necessary, why then I can renew it. I have no idea of delay at all, but it just came to me.

The Court: You may renew it, of course.

Mr. Holman: One other thing, your Honor. I have not had the telegram from the attorney for the Seattle First National Bank, but I presume it will be in some time during the day. Mr. Hawkins is arranging for Mr. Goerig to be here with a copy of the papers Mr. Macri was supposed to present.

The Court: All right, proceed. [188]



## M. C. SCHAEFER

the plaintiff, a witness in his own behalf, resumed the stand and testified further as follows:

Direct Examination  
(Continued)

By Mr. Olson:

Q. Mr. Schaefer, just relate briefly to the Court what trips you made to the job site and what inspections, if any, you made of the excavations on the job under 1062. •

A. All right; that was on April 18 that I checked up on the excavation, and at that time they had a few of the structure forms set, and the excavation was vertical, and it was tight; our own crew did the majority of the fine grading, and had to excavate out to make room for our forms. The next date that I have record of being out on the job, we had an appointment with Mr. Macri on April 28. We waited on the job all day for Mr. Macri, and had conversation with Mr. Staples at the time——

Mr. Holman: I move that answer be stricken as not responsive, your Honor. The question is when he was on the job.

The Court: The last part is not responsive. It will be stricken.

Q. Were you at the job site on April 28, 1944?

A. No; that is, yes, I was on the job site, but I didn't go out in the field. I waited on the job for Macri to appear at the office.

(Testimony of M. C. Schaefer.)

Q. Just state what occurred on that day. [189]

A. On the 28th we, William E. Schaefer and myself, had an appointment with Sam Macri at 10 o'clock at the job office. Macri did not show up. Mr. Staples, Macri and Company superintendent, came in from the field in the afternoon. I asked him to locate Macri. Staples called Seattle and did not reach Macri.

Q. Who is Mr. Staples?

A. Staples was then Macri Company superintendent. Did not reach Macri at Seattle——

Mr. Holman: What is that you're reading?

A. That is the notes made at the time of the meeting out at the site.

Q. Who made the notes?           A. I did.

Q. Without reading them, Mr. Schaefer, you can refer to them to refresh your recollection, just tell us what took place on the 28th. Did you have a meeting with Mr. Macri on the 28th of April?

A. No, Macri didn't appear on the 28th. We stayed over until the 29th.

Q. Now, on the 28th, whereabouts were you on the site? You said you weren't out at the excavations. Where were you?

A. No, we stayed at the office.

Q. And is that where you made up your forms?

A. That's right. [190]

Q. Did you observe anything there at the yard that day?

A. On the 28th of April, yes. They were building forms in the yard.

(Testimony of M. C. Schaefer.)

Q. Did you have any forms already finished? Go ahead and tell the Court, Matt, what you saw with reference to forms.

A. All right; we had form panels built, and the carpenters were building additional form panels. The lumber that we were then using was about the best that had arrived at the job during the course of the whole construction.

Q. How about the lumber that you had received previous to that time; was it all right?

A. That was lumber that we were using, that had been delivered previous.

Q. All right.

A. The lumber was wet. At that time we didn't have lumber that was full of knot-holes or faults of that kind, but it was so wet, which later on we had to do a lot of repair work on.

Q. Now, explain to the Court, so that the Court will know, Mr. Schaefer, whether the fact that the lumber was wet interfered any with the job.

A. It did.

Q. And in what respect?

A. The shrinkage in the form lumber caused the forms to open [191] up to the extent where you could shove a pencil through between the laps of the shiplap, requiring that we had to cut strips to fill some of the gaps, and to take off the sheeting and re-sheet these panels. We did that both to the forms in the yard that hadn't gone out to the job, and we had to do it with some of the forms out at the site.

(Testimony of M. C. Schaefer.)

Q. Now, you say you did talk with Mr. Staples that day, on the 28th? A. Yes.

Q. And that's Mr. Macri's foreman?

A. That's Mr. Macri's superintendent.

Q. What conversation, if any, did you have with him that related to this job 1062?

A. Might I read that?

Q. I assume counsel doesn't want you reading your notes.

The Court: Use any memo you made at that time to refresh your memory. Don't just read from it. If you need to, look at it to refresh your memory, then you can tell us, if that does refresh your memory, what the conversation or the transaction was.

A. Staples called, I requested Staples to get in touch with Mr. Macri, and that I wanted that Macri be there before noon the next day, otherwise we were going to gather up our equipment and pull off the job.

Q. Did you tell him why? [192]

A. Because of their excavations not being made as specified, and because of the lumber situation, the general condition of the job. It was just not progressed. The fine grading wasn't ahead, there was no one in charge to do proper fine grading, our foreman on the job had to help their men lay out and check their fine grading.

Q. Had you seen your men——

Mr. Holman: Just one minute. May it please the Court, for the purpose of the record, this would

(Testimony of M. C. Schaefer.)

follow through, your Honor, I move that the witness' last answer—I would like to ask the witness one question in support of my motion, if I may.

Mr. Olson: Go ahead, counsel.

Mr. Holman: Did you send written notice at that time or within five days thereafter to Macri?

Witness: I did not.

Mr. Holman: Now, then, your Honor, in view of the witness' testimony, I move that the answer be stricken, for the reason of the following provisions in the sub-contract 1062, Exhibit 5, and also the same paragraph in Exhibit 6. Paragraph 5 reads as follows, upon which I base the motion—

The Court: Where are you reading?

Mr. Holman: Paragraph 5, under the heading of "Delays" on page 4, your Honor. [193]

The Court: The sub-contract?

Mr. Holman: Yes. Does your Honor have the printed form?

The Court: This is the printed form, yes.

Mr. Olson: It is 5, under Article III.

The Court: Oh, I see.

Mr. Holman: Under the heading of "Delays".

(Whereupon, Mr. Holman read paragraph 5, Article III, of plaintiff's Exhibit 5; and read paragraph 9 of Article I of plaintiff's Exhibit 5.)

Mr. Holman: In other words, it is our position, your Honor, that the contract provisions control,

(Testimony of M. C. Schaefer.)

and that notice would have to be given before this could become pertinent or relevant for any recovery by Schaefer.

Mr. Hawkins: The defendants Goerig and Philp join in the motion.

Mr. Olson: If your Honor please, what I'm attempting to show by this witness is the fact that he got Mr. Macri over here, first had an appointment to be here the 28th, he didn't come, we got him here the 29th, for the very purpose of taking him out and showing him item by item the very things he wasn't doing. I'll show also previous complaints made by the foreman, by our foreman. This was a meeting in the field in which they were pointing [194] out to him specifically the very things we complained of were wrong, and why. It is true that doesn't constitute a written notice, but your Honor, certainly a personal pointing out on the job is equivalent to a written notice. Now, the point that counsel is raising is also a matter of law that we'll have to go into at the end of the case. As I understand, counsel wants to make his objection and it is going to go to some other evidence, but it will be our position, your Honor, that by virtue of Mr. Macri's breach of this contract, that this contract became abrogated, and that we're not bound by it in any particular whatsoever.

The Court: I'll overrule the objection at this time.

(Whereupon, the reporter read the last complete question and answer.)



(Testimony of M. C. Schaefer.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Had there been any concrete poured yet, Mr. Schaefer?      A. No, there hadn't.

Q. Then what did Mr. Staples do then, if anything?

A. Well, Mr. Staples then said "Don't do that, Matt; I believe Mr. Macri isn't going to interfere; I believe he's going to quit interfering with my program, telling me to lay off men, that I've got too many men on the job; and that I'm just going to go ahead with the men, and [195] we'll see that the excavating work is done according to specification, and you're not going to be delayed any further"; and I told him that that wasn't enough, that I wanted him to get in touch with him, and he says "Well, don't pull off the job, I'll get in touch with him" so then he called Yakima and talked to Mr. Macri. In other words, he fumbled around at the side of the studs looking for a telephone number, and I doubt——

Q. Never mind. Did you the next day meet with Mr. Macri?      A. Yes.

Q. And whereabouts?

A. I believe we met with Mr. Macri at the office, and drove out to the field.

Q. You say at the office; you mean on the job site?      A. The job office.

Q. All right; now, this is what date?

A. This is then on the 29th.

(Testimony of M. C. Schaefer.)

Q. Of what? A. Of April.

Q. What year? A. 1944.

Q. April 29, 1944. Now, who was there?

A. There was William E. Schaefer, myself, Fred Waltie, our superintendent, George Schuler, a form setter, Mr. Macri, and Mr. Staples came in to the conversation later, as I [196] remember.

Q. All right; now, just tell the Court, Matt, what happened on that day, what was said, and what you did, and what you saw.

A. We drove out to the field and stopped at structure number 18. At that structure there was Fred Waltie, our superintendent, and George Schuler, a form setter, were excavating. It was at the head of the siphon or piece of pipe line. The excavation there had been dug not to the bottom of any part of the floor of that structure, but at the top elevation of that floor, and instead of being on an incline it was excavated level. The head wall of that structure was about—had about a foot short—that is, the excavation for the head wall was a foot short of the concrete wall itself, let alone have an excavation out for any forms at the end of that particular wall.

Q. Now, for the record, can you explain briefly what you meant by the head wall?

A. That is the main wall across the ditch.

Q. Would that be at the entrance of the structure?

A. At the entrance to the pipe. I then had Schuler and Waltie stop excavating, and I asked Waltie to come with us to check these excavations.

(Testimony of M. C. Schaefer.)

Q. Schuler and Waltie were whose employees?

A. Concrete Construction Company.

Q. And they were excavating, you say?

A. That's right.

Q. Was that a part of your contract?

A. That was not.

Q. What did you do then?

A. Then Waltie sent Schuler to the yard to work, and then Fred Waltie came with the rest of us, that is, brother Bill, Macri, and myself, to check excavations.

Q. I don't think we've brought out yet what capacity your brother W. E. Schaefer held in this job.

A. He is the general superintendent.

Q. He is the general superintendent of the entire work?

A. That is over all our operations.

Q. All right; then what did you do after you picked up Mr. Waltie?

A. Waltie then came with us, and we went out to check the excavations. We checked approximately six or seven holes, and they were all off; they were all dug with vertical banks, and some that were not dug wide enough for the neat concrete, and at no place in these structures with the exception of the lead-in, or at the pipe, where the trenches were dug for the pipe laying, or at the open ditch section, was there a foot, or any more than a foot, of clearance. Much of the structures were less than [198] enough to accommodate the neat concrete.

(Testimony of M. C. Schaefer.)

Q. What do you mean by that, Matt, they were "less than enough to accommodate the neat concrete"?

A. If a person was to have built the concrete structure somewhere else, and just deposited it in this hole, he couldn't have got them in, because the excavation was not wide enough to fit that structure.

Q. How about the fine grading on those structures?

A. The fine grading was all off. There were some of the vertical banks that had been dug too wide, and some where the dirt bank hadn't been dug back far enough.

Q. You say the dirt bank; what do you refer to there?

A. That is at the difference between two structure elevations or two structures in the same hole. There may be one structure that has a 7 foot section, and the other section perhaps 4 feet or 2½ feet, and at the joining wall between these two structures there is a neat cut where the concrete flows against or lays up against the dirt bank.

Q. That's not the outside bank, then, that is supposed to be on the slope, that you're talking about?

A. No.

Q. Now, what else did you notice, if anything, about these excavations?

A. Macri then said "Well, we're just getting started; you've got to expect some of this; you're supposed to do two or [199] three tenths of the excavation anyway".

(Testimony of M. C. Schaefer.)

Mr. Holman: Move it be stricken as not responsive.

The Court: Read the question.

(Whereupon, the reporter read the last previous question.)

The Court: The answer wasn't responsive. It will be stricken.

Direct Examination  
(Continued)

By Mr. Olson:

Q. Were there any of the excavation, Mr. Schaefer, that had structures in them, that you saw this day, the 29th day of April, 1944?

A. Yes, that's where we had the forms.

Q. Pardon?

A. Where we had the forms set, yes.

Q. Now, would you describe what the situation was as you observed it there, that is, excavations with the forms in, what clearance, if any, was there between the structure and the bank?

A. There was very little; there was very little clearance; in the majority it was clearance that our own men provided in order to get the forms; even to set the forms.

Q. And was there a slope or not, to the bank?

A. There was no slope.

Q. What was said, now, if anything, between Macri and yourself, or Macri and the other men there? [200]

(Testimony of M. C. Schaefer.)

A. Macri told me that we were to do that; they were just getting started, and that we were to do two or three tenths of the excavating ourselves, and I told him that we didn't have a thing to do with it, that that was up to him. Macri said "All right, we'll get the excavating right from now on", and turning to Staples, said "You get the men in here and get this little grading done"; and then looking at me, he asked me that we should go ahead with the excavating, and he'll pay for it——

Mr. Hawkins: Your Honor, the witness is reading from notes he's evidently prepared for this testimony; I don't think that's right.

The Court: You should refresh your memory from that, and then testify.

Mr. Hawkins: He's worked up this story.

Witness (Continuing): I said "Now just a minute, you know better than that; you do the excavating, according to the plans and specifications, and that it was for an excavation out one foot and on a 1 to 1 slope".

Q. Did you have any other conversation with him?

A. And I asked him to have sufficient men and equipment in there to get going so we wouldn't be stymied like we were at that time. I told him of his previous promises of having additional equipment on the job, and of having more men on the job, and that he would have his excavation [201] dug according to specification, that he was going to have ample lumber, better lumber, and have it



(Testimony of M. C. Schaefer.)

there in time and so that we would be able to flow with our work and pour not less than twenty yards of concrete per day, that was the average that we wanted to arrive at, and he had promised to so operate his work that we would be off of the job, with both job number 1, that's 1062, and 1068 by September 15.

Q. Of what year?

A. Of 1944, and he said "Well, what are you hollering about; you'll be out of here by September 15, we're all gonna be out of here by September 15; there isn't gonna be anybody lose any money on our job; we're just getting started here; we'll get this thing straightened out and get going"; and then I asked him when he was going to get going, and well, he says "I'll pay you for the expense of excavating that you do here".

Mr. Hawkins: Just a moment. I object to that and move to strike it. In the first place, it is not responsive to any question asked, and in the second place, there is a written contract in this case, and all of this testimony is purely parol for the purpose of modifying or changing that written contract, and I object to its introduction. I move it be stricken.

Mr. Holman: I join. [202]

The Court: I think it is responsive in a general way. He's been asking about these conversations. As to this modification what do you say?

Mr. Olson: Your Honor, the rule against modification relates only to oral statements made prior to the written contract. There is no rule against

(Testimony of M. C. Schaefer.)

having a written contract changed by a valid oral agreement made afterward, based on a consideration.

Mr. Hawkins: He hasn't testified to any oral agreement.

Mr. Olson: He just started to, until you objected.

Mr. Hawkins: He testified he promised to do this and that, and the only thing this man is giving in consideration for that is that he will perform the contract that is already signed.

The Court: Well, I'll overrule the objection; you may proceed.

#### Direct Examination

(Continued)

By Mr. Olson:

Q. All right, proceed with the conversation.

A. I said "That isn't all you're going to pay for; who's going to pay for the extra expense of building panels in the way that we're now required to build panels, or setting these panels in holes like this, such type of holes, instead of to specification, of stripping the forms out of these holes, doing the necessary excavating [203] to get them out, wrecking them, having to haul them all back to the yard for repair, instead of to structures ahead"? Our figure was based on doing just that, taking our structure panels to the job, building our forms, pouring the concrete, then stripping the forms, without but very little damage, moving them on to

(Testimony of M. C. Schaefer.)

structures ahead, instead of hauling them all the way back to the yard.

Q. Could that have been done if you had had the excavation out a foot and 1 to 1 slope?

A. That is right.

Q. And could you take your panels and forms out without damaging them in view of the excavations that were made?

A. No; some of the forms the boys hooked a truck to, to pull them out of the hole, and they were really wrecked.

Q. Now, what else was said, if anything, between you and Mr. Macri on this date of the 29th?

A. Macri said "I'll pay you for all extras". He says "All right, I'll pay you for all the extras, just get going". I said "You're going to pay for all the additional cost and expense; you're paying for all of the extras". He says "Well, that's all right, I told you that before".

Mr. Hawkins: Again we object to that, and move it be stricken.

Mr. Holman: Not responsive, your Honor. [204]

The Court: I'll overrule the objection.

Witness (Continuing): And so I said "All right, you've stated that you'll pay for all additional cost and expense, you're going to pay for all the extras, you're going to have the necessary men and equipment in here, you're gonna provide lumber sufficient and on time, and you're going to get going with the excavating so we can pour the minimum of twenty or twenty-five yards per day,

(Testimony of M. C. Schaefer.)

and we're never gonna be stymied like this again". He said "Well, that's it, that's all right".

Q. Is that the substance, then, of what took place that day? A. That's it, yes.

Q. Now then, how did the work—pardon me.

A. Excuse me; back at the office later I had further conversation with George Staples.

Q. What was that conversation?

Mr. Holman: Just a minute: I object to the witness just reading off of this, your Honor; that's all he's doing.

The Court: He hasn't been reading, he just turned to refer to it again. I think he can refer to his own memoranda.

Mr. Holman: If it is made at the time, your Honor. If it is a trial memo I submit he hasn't a right to. [205]

The Court: He testified, as I understand it, that he made this at the time of the transaction.

Witness: This here was typed off of notes that were made that day.

Mr. Olson: That's what I understand it is, the notes made that day.

Mr. Holman: If he needs to refresh his memory from the notes he made that day, I submit it is proper, but certainly not to read from a trial brief.

Mr. Olson: I don't have any trial brief, counsel. I've got one, but he isn't reading it.

Witness: Then I'll read off of this.

The Court: No, just refresh your memory from it, if you need to, and then testify as to what happened.

(Testimony of M. C. Schaefer.)

Direct Examination  
(Continued)

By Mr. Olson:

Q. All we're asking, Matt, is to give the substance of this conversation. You don't have to give it verbatim, word for word, but the substance of it.

A. Back at the yard later I asked Staples "Now, what are these promises gonna amount to"? because we had had so many promises previous to these meetings, and Staples said——

Mr. Holman: I move that be stricken, your Honor.

The Court: Well, it's a conversation, as I understand it, with the defendant Macri's foreman. I'll overrule [206] the objection; deny the motion to strike.

Witness: Staples said "Now, that's it; out in the field Macri told me to go ahead and do the excavating and get things on the button, and then a little later he told me to keep going as I was" and he says "Matt, I'm getting tired of this; Macri is paying my salary, but this buck-passing isn't a part of my agreement".

Mr. Holman: Just a minute, your Honor. I object to that, and move it be stricken as not binding on Macri in his absence. I thought he was going to testify as to Macri's instructions, but now we're having a conversation between Mr. Schaefer and Mr. Staples pertaining to their own views.

(Testimony of M. C. Schaefer.)

The Court: Well, I think that insofar as the conversation relates to Staples relating to this witness what Mr. Macri had said at some other place should be stricken and disregarded. I think the foreman would have power to bind Mr. Macri as to something about the job, and if the conversation pertained directly to the job it is admissible, but I don't believe he should relate what Macri said to him. It would be hearsay.

Mr. Olson: It goes to what Macri's instructions were. Out in the field he told Schaefer he's going to do the excavation. After they get a little apart he says——

Mr. Holman: Mr. Staples is right here, your [207] Honor.

The Court: The way to prove that is by Mr. Staples. I will grant the motion as to that portion of it relating what Mr. Macri said to Staples.

Direct Examination  
(Continued)

By Mr. Olson:

Q. All right, Mr. Schaefer, what was the progress on the job, or what was the performance, from that time on?

A. Well, I wonder whether I can go ahead with what Staples——

Q. You can testify to a conversation with Mr. Staples as long as you aren't relating in that conversation what Mr. Staples said that Mr. Macri said to him, as I understand it.



(Testimony of M. C. Schaefer.)

The Court: Yes.

A. All right, then I still say this about it. Staples said "I knew yesterday where to locate Macri——

Mr. Hawkins: I object to that, your Honor.

Mr. Olson: That's all right; part of the delay. Here's Mr. Macri's foreman——

Mr. Hawkins: Well, let's have Mr. Macri's foreman testify, then. This witness is testifying to something that is another situation might be insubordination.

Mr. Olson: Here is Mr. Macri's own foreman, in charge of this job. We've got a right to say we had a meeting here, and he knew where he was, but he didn't locate him, and held it up for another day. [208]

The Court: I'll sustain the objection to that. I think it is going too far afield.

Direct Examination  
(Continued)

By Mr. Olson:

Q. Mr. Schaefer, go ahead then and tell what performance, what was the nature of the performance by Macri and Company of its excavation work and furnishing of lumber after this April 29 meeting.

Mr. Holman: Your Honor, for the purpose of the record I would like to again interpose the objection previously made, and move that testimony

(Testimony of M. C. Schaefer.)

be stricken as contrary to the provisions of the subcontract, which I have previously indicated to the Court, namely Article III, subdivision 5, and Article I, subdivision 9, which I have read to your Honor from Plaintiff's Exhibit 5.

The Court: Overruled.

Q. Do you have the question in mind?

A. No, I don't have.

(Whereupon, the reporter read the last previous question.)

A. Well, at this April 29 meeting I asked Mr. Macri what was going to happen a week from then, what we were going to be working on, and his progress or his method of excavating was no different from that time on; there wasn't any improvement in his operation.

Q. Were the banks excavated to a 1 to 1 slope after that? [209]

A. They were not.

Q. How were they excavated?

A. Vertical.

Q. And what was the situation as to clearance around the structure?

A. It was the same as had been previous, on all previous excavation. There was no clearance.

Q. And what was the situation with reference to fine grading?

A. The fine grading was in the same terrible condition.

(Testimony of M. C. Schaefer.)

Q. Do you know, Mr. Schaefer, when it was, if ever, that the Macri Company had any excavations completed and ready for installation of structures?

A. I don't quite get your question on that.

Q. Well, up until this April 29, as I understand you, there had still been no concrete poured.

A. That is right.

Q. Now, when was it you got down to the place where you could start pouring some concrete?

A. That was the last day of July.

Q. And give us the year each time, Matt, so it gets in the record.

A. Well, I wanted to point out a few more dates.

Q. The last day of July, what year?

A. 1944.

Q. All right, just go ahead and tell about it.

A. Let's see, I wanted to follow through on the different meetings that we had on the job; is that all right?

Q. Go ahead.

Mr. Holman: Your Honor, I ask that the witness be required to answer questions, instead of volunteering statements here.

The Court: He will answer questions. You answer the questions your counsel asks here, and if you feel it is necessary to refer to your notes to refresh your memory, you can do so, but it isn't permissible to read from a prepared memorandum.

Q. Go ahead, Mr. Schaefer, and relate what meetings you had on the job from time to time after

(Testimony of M. C. Schaefer.)

this April 29 meeting, what you saw and what was said and who was there.

A. On May 2, 1944, I again had an appointment with Sam Macri at the job, and he didn't show up.

Mr. Holman: I move that be stricken, your Honor. He's asked to say what he saw on the job. That isn't responsive.

The Court: Well, I'll let it stand. Go ahead.

A. We then checked the holes, the excavations, again, and they were still in the same—there was still the same situation.

Mr. Hawkins: What date was this?

A. That was on May 2. [211]

Q. Were there on that day, Mr. Schaefer, any excavations that were completed so that you could come out there and put your structural forms in place without doing any excavating?

A. No.

Q. Or fine grading? A. No.

Q. There were none ready?

A. There had been none on May 3. There was no work, no holes ready, and no lumber.

Q. Now, what was the situation on the lumber on May 3?

A. On May 3 there wasn't any lumber.

Q. Whereabouts was that?

A. In the yard.

Q. What do you mean by no lumber there?

A. There wasn't any lumber for our carpenters to build panels or to use out in the field. There was just no lumber on the job.

(Testimony of M. C. Schaefer.)

Q. What would you have to do with your crew when there was no lumber on the job? What did you have to do with them? What would you do with them?

A. At that time I don't know whether we—well, we just scattered them over the job, either had them go out to help set, or tie steel, just sort of had to shift around. It was just a lot of kill time. [212]

Q. All right, now, after May 2, when was the next date that you had that you were out there?

A. On May 6 Fred Waltie and George Schuler came into Portland and asked me whether—

Mr. Holman: Just a minute. I object to it as hearsay.

The Court: Yes, that would be hearsay.

Q. If it is just a conversation amongst yourselves you can't tell it. The conversation will have to be with Mr. Macri or his foreman.

The Court: Well, it is about time for overnight adjournment here. I'd suggest that during the adjournment period the witness refresh his memory from the notes he has and be in a better position to testify than he was today, without reading the memorandum.

(Whereupon, the Court took a recess in this cause until Tuesday, February 25, 1947, at 10 a.m.)

Yakima, Washington, Tuesday, February 25, 1947

(All parties present as before and the trial was resumed.)

The Court: I think the record should be a little more clear as to Mr. Holman's request with reference to the witness Nelson, who is shown by telegram not to be available. I'm not just sure that I know what Mr. Holman has asked the Court to do here. There are two methods by which you can take a deposition. You can give notice to the opposite party to take an oral deposition, or serve written interrogatories. There is no provision for a commission to issue by the Court, and it seems to me that unless counsel stipulate to take a deposition next Saturday, the time obviously would be too short to take it either by the oral or the written method. The Court assumed your request was tantamount to a motion for continuance in this case, and I don't believe that such a motion is timely.

Mr. Holman: Your Honor, may I answer your Honor in the morning? I may be able to cover something by long distance tonight. I don't want to do anything that is not necessary.

The Court: I just wanted to be sure that the record is clear here. I think there should be some showing how far it is from here to Boise. The record should show how far it is, that it isn't around the corner. How far is it to Boise?

Mr. Olson: I'll give it to you exactly, your Honor. 425 miles, and it is out of this district.



Mr. Holman: I know it is beyond—that's approximately right—it is beyond a subpoena. [214]

Mr. Ivy: If your Honor please, I would like to move at this time that exhibits 10 and 11 be admitted. I was absent after lunch.

The Court: Those are the applications for bonds. Is there any objection? They will be admitted.

(Whereupon, Defendant Casualty Company's Exhibit No. 10 for identification was admitted in evidence.

(Whereupon, Defendant Casualty Company's Exhibit No. 11 for identification was admitted in evidence.)

The Court: Well, that admits all of them from 1 to 12 inclusive. This case will be resumed at 10 o'clock in the morning.

(Whereupon, the Court took a recess in this cause until Tuesday, February 25, 1947, at 10 o'clock a.m.)

Yakima, Washington, Tuesday, February 25, 1947  
10 o'Clock A.M.

(All parties present as before and the trial was resumed.)

The Court: Did you have something before we start, Mr. Hawkins?

Mr. Hawkins: No, I just want to bring your Honor up to date on the demands we made on

Macri to produce certain documents. The claim against the government is [215] in my office being copied again. I'll have that later, and we received word from Mr. Henry yesterday that the bank's only copy of the original of the assignment had been misplaced and nobody was able to locate it. I talked to him last night and explained that all we wanted was a copy with a letter from him that it was a true copy of the original. He said it would undoubtedly turn up and he would send us a copy.

Mr. Holman: He communicated with Mr. Hawkins instead of me, your Honor. I wonder if I may again with consent of counsel and with your Honor's permission call some witnesses out of turn? I have subpoenaed the government field men, merely in connection with their data on the instruments filed here, for this morning. I did that some time ago. I don't think it will take long, with your Honor's permission and counsel's; I just hate to have them sitting around. They are very busy.

The Court: Do you have any objection, Mr. Olson, to calling a government man, Bureau of Reclamation?

Mr. Holman: There are six of them, your Honor, but it will not take long.

Mr. Olson: I have no objection.

## V. E. NUTLEY

called as a witness on behalf of the defendants Macri, being first duly sworn, testified as follows:

## Direct Examination

By Mr. Holman:

Q. Your name and residence?

A. V. E. Nutley. I reside at Sunnyside, Washington.

Q. And you have an official position with the United States Bureau of Reclamation?

A. Yes.

Q. What is it?           A. Field Engineer.

Mr. Holman: Counsel, may I assume you admit the qualifications of these various gentlemen unless you question them?

Mr. Olson: Yes.

Q. I will pass your qualifications, then, Mr. Nutley. Were you in charge of the field engineering for the lay-out of the portion of the Roza Project known as 1062, Schedule 1?

A. Part of them.

Q. Yes; and did you stake those structures out, or your crew, under your direction?

A. Crews under the direction of the resident engineers, who report to me, staked out the structures.

Q. And are you familiar, too, with specification 1068? Did you have similar work there, Mr. Nutley?           A. Yes, sir.

(Testimony of V. E. Nutley.)

Q. Will you explain to the Court, please, how a structure [217] is staked by your engineering force for the purpose of guidance to carry on the work under the specifications?

A. Well, you have the forms over there; you can see what a structure is.

Q. Those haven't been introduced yet.

A. Oh, they haven't been introduced; you can't see them, then. The structures are——

Mr. Olson: I have no objection to having these structures marked for identification if it will assist in explaining the testimony of the witness.

Mr. Holman: Well, I prefer to try my own case, your Honor.

Witness: The structures are boxes or combinations of boxes, and one main wall of the structure was referenced out generally, with a stake on each side, that is a hub, a two-inch square hub, with a tack in it to make an absolute point. The hubs were set out between 10 feet and 25 feet, one on each side, depending on the slope of the ground and other things that were in the way near there. Often one of these hubs would also be referenced out so that when it was lost, which it often was, it could be replaced easily, and beside each hub is a guard stake on which is written the structure number, the elevation of the hub, and the distance from a given point on the wall, which was the wall or weir that was picked out [218] as the main point of the structure to reference out.

(Testimony of V. E. Nutley.)

Q. When you speak of the elevation, is that the elevation of the top of the floor of the structure?

A. The elevation mark on the guard stake which refers to the elevation of the hub is the elevation of the hub above sea level—and I guess that's all you asked me.

Q. Yes, sir; then the top of the floor of the structure when completed would be at that elevation, or at a different elevation?

A. No, the hubs were not marked—there was no attempt made to set the hubs at the elevation of the top of the wall; the structure drawings showed the elevation of the top of the wall, and the elevation of the hub was marked on the guard stake.

Q. Then this elevation stake is the one stake that is definitely fixed to engineering data in connection with the line, grade, and all that?

A. Well, it takes two.

Q. What is the other stake?

A. You have to have two, to get your line.

Q. But that type of stake?

A. Yes, that's right, for the elevation.

Q. And that is the way that both of these projects that I mentioned were staked?

A. Yes, sir, to the best of my knowledge and belief. [219]

Q. Well, you've seen the stakes, had you not?

A. I saw a good many of the structures.

Q. Yes; all right, thank you.

A. Probably 50 per cent of them; that's the way they were done.

(Testimony of V. E. Nutley.)

Q. That is the engineering practice of the Bureau?      A. Of our organization, yes.

Q. Now, will you tell me whether or not after excavations had been made, the Bureau of Reclamation returns to measure the excavated quantities, measure in the field? Do they?      A. No.

Q. How is that computed?

A. The excavated quantity is computed from an average elevation of the ground at the structure, and theoretical cut lines one foot out from the concrete and up on a one to one, in earth excavation, which most of it was on those two jobs. It is in rock, too.

Q. And rock was one quarter to one?

A. No, I think rock was one half to one.

Q. It's what is provided in the specifications?

A. Yes, it is what is provided in the specifications, whatever it is. I wouldn't remember exactly on that. You can look in the specifications and see.

The Court: One quarter to one, isn't it? [220]

A. Is it a quarter to one?

The Court: Well, we had better look.

Q. That is my recollection. I can call it to your attention by number, Mr. Nutley. Just a minute. You are referring to plaintiff's Exhibit 3; I think it is 47. Isn't it paragraph 47?

A. It is paragraph 47, on page 23. A quarter to one, rock excavation.

Q. Yes. In other words, the computation, Mr. Nutley, is determined according to specifications?



(Testimony of V. E. Nutley.)

The Court: Does the rock have the same clearance, one foot, as the earth?

A. The rock has the same clearance at the bottom, yes.

The Court: One foot clearance on the bottom, and one quarter to one?

A. No, one quarter to one.

The Court: That's what I tried to say.

A. That's right, one quarter to one, and one to one for the common.

Mr. Holman: You may inquire.

Mr. Olson: Pardon me just a minute.

The Court: Were you through, Mr. Holman?

Mr. Holman: The witness indicated he hadn't quite finished.

A. Did I say that 1068 we computed the excavation that way? [221]

#### Direct Examination

(Continued)

By Mr. Holman:

Q. No, sir, I was asking about 1062.

A. I believe that's what we did on 1062.

Q. Now, will you tell me what you did on 1068?

Mr. Olson: Object to that as being immaterial, how they computed on 1068.

Mr. Holman: On the issues of this case, and if counsel is willing to accept the government computations as to quantities, I think it would be immaterial.

(Testimony of V. E. Nutley.)

Mr. Olson: Well, not if you're attempting to show that the Bureau and Mr. Macri got together and computed it on some manner differently than the one foot out and one to one slope. That's what I anticipate the question calls for.

Mr. Holman: I don't see how counsel can impute that. I don't intend to infer the Bureau gets together with anybody.

The Court: I don't know what the answer will be. I understand this applies to the method of computation. I'll overrule the objection.

A. The point I was going to make, about that time we began making agreement with the contractor to pay him two feet out at the bottom and vertical side wall, and I don't know whether we did on 1068 or not. I don't think we did. I think 1068 was computed this same way, but I can't [222] remember, because we did do that about that time.

Mr. Holman: I am willing to have the question and answer stand or be stricken, just as counsel prefers.

Mr. Olson: Well, I'm satisfied with my objection as to immateriality.

Mr. Holman: In order to save the record I'll ask that the question and answer be stricken.

The Court: Yes, I think it should. It is of little value.

(Testimony of V. E. Nutley.)

Cross-Examination

By Mr. Olson:

Q. Mr. Nutley, it is a fact, is it not, that the computation for payment for excavation is made at the division office here in Yakima?

A. That's right.

Mr. Hawkins: I object to that as not proper cross-examination, your Honor.

The Court: Overrule the objection.

Q. Far as you yourself were concerned, you had nothing to do with making that computation?

A. Only supplying the data necessary for it.

Q. And then the computation was made, I believe, by Mr. Keeler here in Yakima?

A. By a man under his direction, yes.

Mr. Olson: That's all.

Mr. Holman: That's all, and may he be excused, counsel and your Honor?

The Court: Do you have any objection to excusing Mr. Nutley?

Mr. Olson: You will be subject to call, in case it is necessary?

Witness: You mean today?

Mr. Olson: No, on reasonable notice.

The Court: You will be at Sunnyside?

Witness: Yes.

The Court: Well, you will be given reasonable notice. You don't have to wait around your office all the time.

(Whereupon, there being no further questions, the witness was excused.)

J. C. HEERS

called as a witness on behalf of the defendants Macri, being first duly sworn, testified as follows:

Direct Examination

By Mr. Holman:

Q. Your name is Jess C. Heers?

A. That's right.

Q. And you reside at Sunnyside?

A. Yes.

Q. You were subpoenaed to attend here, were you? A. That's right.

The Court: You'll have to speak up. [224]

Q. Mr. Heers, there has been offered for identification as Macri's number 13, through Mr. Pease of the Yakima office, the inspector's daily reports. I guess I'll have to open those. May I open them, Mr. Clerk? I want to refer to certain ones. I wish to refer to those, Mr. Heers, and ask you if you were for a time resident engineer on the portion of the Roza Reclamation Project known as 1062, schedule 1? A. I was chief of party.

Q. Chief of party; thank you; and for what period of time?

A. It was from April 3 until July 11, 1944.

Q. 1944? A. Yes, sir.

Q. Now, during that time did you have an opportunity—pardon me—did you make daily reports?

(Testimony of J. C. Heers.)

A. No; I believe I made three at the beginning of the job, before there were any inspectors on the job, I made an inspector's report.

Q. With reference to those reports, I direct your attention, you probably can find them quicker than any of us, to your report for April 14, 1944. Would you step there and see if you can find that?

A. Are these in chronological order here, or what?

Q. I presume so; that is just the way Mr. Pease brought them. Strike the question, Mr. Reporter. Will you refer to [225] that identification 13 and get the portion that bears your signature for that period, Mr. Heers? Can you find it, Mr. Heers?

A. I don't see it here—here's one, May 26.

The Court: What year?

A. Of 1944, and June 19, 1944.

Q. Can you find any entries for April, 1944?

A. Here's one May 25, and April 26.

Q. I see; now, can you find April 14?

A. April 14?

Q. Yes, sir.                      A. Yes, I have it here.

Q. With reference to that entry of April 14, will you read, please, what you entered, into the record?

Mr. Olson: Now, if the Court please, I don't think the report should be read into the record. I don't know what it is. If it is something that this witness saw, and he needs this report to refresh his

(Testimony of J. C. Heers.)

recollection to describe it, and it is material—I don't know what this is.

Mr. Holman: What I proposed to do with each of these witnesses, your Honor, was to have them read from the record the official factual report they made at that time.

The Court: The document the witness has has been [226] identified in bulk, if I might put it that way, but has not been admitted in evidence. I think Mr. Olson's point is that before any of this should be read into the record, it should be shown that the witness has personal knowledge, if it is a personal report he made.

Mr. Holman: I asked him if he signed it.

The Court: You asked him to get one he signed. I suppose if he signed it he knows its contents. You might develop it. Is that what you had in mind, Mr. Olson?

Mr. Olson: It goes further than that. There isn't anything sacred about one of these documents because it is in the Bureau of Reclamation. This is a job between Macri and the sub-contractor. I assume this is a field inspector who has gone out and seen something on the job, and if he has, and it is material, he can testify to it.

The Court: Of course, it would have to be admissible.

Mr. Olson: The fact he wrote it down and sent it to somebody it doesn't seem to me admits it in evidence.

The Court: You can show what it is.



(Testimony of J. C. Heers.)

Direct Examination  
(Continued)

By Mr. Holman:

Q. Is that entry of that day one that you made in your own official capacity to your superior from your inspector in the field? [227]

A. Well, I was chief of party, and in the absence of an earthwork inspector I made an earthwork report. Ordinarily I wouldn't have made a report.

Q. And you did make that report to your superior? A. Yes.

Q. And that report bears your signature?

A. Yes, it does.

Q. And that's part of your official record you have taken out of identification 13?

A. Well, these are turned in to the office,

The Court: That pertains to which contract, 1062?

Q. 1062, your Honor. That's correct, is it not, pertaining to 1062?

A. That's right; it is marked on the sheet.

Q. Would you now read into the record that entry?

Mr. Olson: I make the same objection, your Honor, that the report made by the inspector to the Bureau of Reclamation is wholly immaterial, irrelevant and incompetent, insofar as the use plaintiff is concerned. There is no binding effect

(Testimony of J. C. Heers.)

on us, what kind of report he made. If he wants to describe what he saw out there, I think that is material.

The Court: I think the official reports here, if they are material, would be admissible. I'll overrule the objection. [228]

Mr. Holman: I might state, your Honor, we will meet the same situation with respect to each of these other witnesses. I'm willing that the record show counsel's objection.

The Court: Well, he can take care of that.

Witness: I have the equipment listed as the Bay City half yard hoe. The hoe was excavating stilling pool and a structure at lateral 59.3 to station 1 plus 75. The patrol grader is excavating earth, lateral 59.3 and branches.

Q. Is that as far as station I, plus 75?

A. That's right.

Mr. Holman: Now, may I request, Mr. Clerk, that that that he has read from be sub-marked by giving a sub-mark identification, and may we furnish a copy of that, your Honor?

The Clerk: Yes.

Mr. Holman: And then we'll offer that in evidence.

(Whereupon, Daily inspection report for April 14, 1944 (Heers) was marked Defendant Maceri's Exhibit No. 13-a for identification.)

Mr. Olson: What is the date of that?

Mr. Holman: April 14, 1944.

(Testimony of J. C. Heers.)

Q. Just as soon as the clerk is through, would you see if you have one for April 18, pertaining to specification [229] 1062, schedule 1?

A. Yes, I have.

Q. You have?           A. Yes.

Q. Would you read that, please?

A. "Patrol grader completed excavation of lateral 59.3 to station 117, plus or minus, to E.O.L. (end of line). The Cat dozer was levelling 59.5. The half yard hoe was excavating for pipe line, lateral 59.3 station 37 plus 50 to station 44 plus 63. The half yard hoe was excavating road crossing at lateral 59.3-5, station 8 plus 80 to station 9 plus 40." Under remarks I have "Concrete Construction Company installing forms at lateral 59.3."

Mr. Holman: May I make a similar request, Mr. Clerk, and have that marked 13-b? In other words, is it practical, Mr. Clerk, to carry them under sub-numbers?

Clerk: Yes, I think we can.

Mr. Olson: We make the same objection, your Honor, to this—that is 4-18-44 you just read from?

A. Yes, that's right.

Mr. Olson: —to the reading of that into the record, and move it be stricken. It is wholly incompetent, irrelevant and immaterial, and constitutes only a report made by parties not parties to this suit, and no binding effect on the Concrete Construction Company. [230]

The Court: Overruled, and the motion to strike denied. Will that be 13-b, then?

(Testimony of J. C. Heers.)

Mr. Holman: Yes, your Honor.

The Court: And what is the date of that one?

A. April 18, 1944.

The Court: All right.

(Whereupon, daily inspection report for April 18, 1944 (Heers) was marked Defendant Macri's Exhibit No. 13-b for identification.)

Direct Examination  
(Continued)

By Mr. Holman:

Q. Then the next, please, will you refer to your record for April 22, 1944?

A. "The half-yard hoe excavating for structures and pipe lines at lateral 59.3 and sub-laterals. Completed all pipe and structure excavation lateral 59.3 this day. Patrol grader excavating channel sections Lateral 60.3. Dozer levelling and grading on lateral 60.3."

The Court: What is the date of that?

A. April 22, 1944.

Mr. Holman: Will you have that marked 13-c?

(Whereupon, Daily inspection report for April 22, 1944 (Heers) was marked Defendant Macri's Exhibit No. 13-c for identification.)

Mr. Olson: We make the same objection and motion, your Honor. [231]

The Court: Same ruling.

Mr. Holman: You may inquire.

(Testimony of J. C. Heers.)

Mr. Olson: I have no questions.

Mr. Holman: That's all, Mr. Heers. May the witness be excused, your Honor?

The Court: Well, on the same condition, I assume, that he will be available.

Mr. Holman: Mr. Clerk, may I request that you have copies made of that at my cost, 13-a, b, and c, and then I'll offer them. Your Honor, may I ask one more question of Mr. Heers?

Q. Mr. Heers, you were subpoenaed to be here, were you not? A. I beg pardon?

Q. You were subpoenaed to be here, a subpoena was served on you? A. Yes.

(Whereupon, there being no further questions, the witness was excused.)

### R. M. MOORHEAD

called as a witness on behalf of the defendant Macri, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Holman:

Q. Your name is R. M. Moorhead?

A. Yes, sir.

Q. You're known as Ray Moorhead? [232]

A. That's right.

Q. You reside at Sunnyside, Mr. Moorhead? What was your position, if any, with the Bureau of Reclamation in the year 1944?

A. I was a concrete inspector.

(Testimony of R. M. Moorhead.)

Q. On what project?

A. On the Roza Project.

Q. And what specifications?

A. Well, 1057, 1062, 1060.

Q. 1057, whose work was that? A. 1060?

Q. No, 1057. A. Murphy Campbell.

Q. What was the next one?

A. 1060 was Osburg and Ludberg.

Q. What other ones?

A. 1060 was Osburg and Ludberg.

Q. Yes; did you name some others?

A. No, I didn't.

Q. Were you on 1062? A. Yes.

Q. Schedule 1? A. Schedule 1.

Q. Mr. Moorhead, I direct your attention to what has been marked Macri's identification 13, the inspector's daily [233] reports. Would you kindly step there to the Clerk's desk and find the reports, any reports signed by you? I want to refer particularly to the month of August, 1944.

A. Here's August.

Q. Bearing your signature, Mr. Moorhead?

A. I have but one for the month of August.

Q. Sir?

A. I have but one report during the month of August, and that was the day that I relieved one of the other inspectors there.

Q. Pardon me just a minute; what inspector were you relieving? A. Mr. Reynolds.

Q. Well, are there any reports there for August 1, 2, 4, 7, 10, 11, 12?



(Testimony of R. M. Moorhead.)

A. Well, there should be.

Q. Will you please locate, if you can, your report for August 1, 1944, signed by you, with reference to specification 1062? A. Yes, sir.

Q. Will you read that, please?

Mr. Olson: For the purpose of the record, your Honor, I think perhaps it would be best if we made our same objection we made before to all this type of evidence, a continuing objection. [234]

The Court: The record may show the plaintiff objects, and objection will be overruled.

A. "Placed 66 one-sack batches concrete in structures 25, 26, 38, 38a, 29, 30, for 11.8 yards."

Q. Now, does that mean 11.8 yards—strike, please; have you any other statement there?

A. "Delays and time wasted, three hours moving and waiting on trucks."

Mr. Holman: May I have that marked for identification? Will that take another 13 sub-number, Mr. Clerk?

(Whereupon, Daily inspection report for August 1, 1944 (Moorhead) was marked Defendant Macri's Exhibit No. 13-d for identification.)

Q. You have one for August 2, have you, Mr. Moorhead?

A. I believe so; August 2, '44.

Q. Would you read that, please?

A. "Strip structures 38a, 29, 30, 31, 32, on Lateral 59.3."

(Testimony of R. M. Moorhead.)

Q. Anything else?

A. "Down for repairs of equipment."

Q. Anything else?           A. Nothing further.

Q. Did you show the foreman?

A. Schaefer, foreman. [236]

Mr. Holman: I ask that be marked 13-e, your Honor.

(Whereupon, Daily inspection report for August 2, 1944 (Moorhead) was marked Defendant Macri's Exhibit No. 13-e for identification.)

Q. Have you any entry for August 4, 1944?

A. August 4, 1944.

Q. Will you read that, please?

A. "Placed eleven 6-sack batches in structures 21, 22, 23, 24, 27, 28; 11.85 cubic yards."

Q. Anything else?

A. "Still having trouble keeping equipment running."

Q. Is the foreman shown?           A. "Wettie."

Q. How do you spell it?

A. W-e-t-t-i-e; that's the way I have it here.

Q. Do you know what the correct spelling is? Is that the correct spelling?

A. Well, I think that it is. I'm not so positive, though.

Mr. Holman: I ask that be marked 13-f for the same purpose, your Honor.

(Whereupon, Daily inspection report for August 4, 1944 (Moorhead) was marked Defendant Macri's Exhibit No. 13-f for identification.)

(Testimony of R. M. Moorhead.)

Q. I notice with reference to the 1944 calendar, Mr. Moorhead, that the 5th is Saturday and the 6th is Sunday. Do [236] you have any entries for those days? You have none for the 5th or 6th?

A. I don't see any under my name.

Q. Do you have one for Monday, the 7th?

A. One for the 7th, yes, sir.

Q. Would you read that, please?

A. "Placed nineteen 6-sack batches concrete in structures 22a, 15, 16, 17, 18, 19, 20, 36, 37, on lateral 59.3 and 59.3-5."

Q. What does 3-5 mean?

A. Well, this is a branch off the main lateral.

Q. Anything else?

A. "Not working very smooth."

Q. Foreman shown? A. Schaefer.

Mr. Holman: I ask that be marked 13-g in the same way, your Honor.

(Whereupon, Daily inspection report for August 7, 1944 (Moorhead) was marked Defendant Macri's Exhibit No. 13-g for identification.)

Q. Do you have one for the 8th, 9th, or 10th?

A. On August 8, 1944.

Q. I mean pertaining to these jobs?

A. Yes.

Q. Go ahead. [237]

A. "Placing concrete in structures 11, 12, 13, 14, 34, 35; twelve 6-sack batches; 12.92 cubic yards. Stripping 18, 19, 20, 22a."

(Testimony of R. M. Moorhead.)

Q. And a foreman? A. "Schaefer."

Mr. Holman: I ask that be marked 13-h, your Honor.

(Whereupon, Daily inspection report for August 8, 1944 (Moorhead) was marked Defendant Macri's Exhibit No. 13-h for identification.)

Q. Do you have one for the 9th?

A. August 9, '44.

Q. Read that, please.

A. "Placed structures 33, 7, 8, 9, 10; ninety 1-sack batches; 16.1 cubic yards."

Q. Anything else? A. Nothing further.

Q. Foreman?

A. Wettie, or Waltie, or whatever the name is. I don't just know.

Mr. Holman: I ask that be marked 13-i, your Honor.

(Whereupon, Daily inspection report for August 9, 1944 (Moorhead) was marked Defendant Macri's Exhibit No. 13-i for identification.)

Q. Do you have one for August 10, Mr. Moorhead? A. August 10, '44. [238]

Q. Read that, please.

A. "Stripping structures 13, 14, 36, 37; checked all forms on 59.5 lateral; no concrete placed today."

Q. And the foreman? A. Schaefer.

(Testimony of R. M. Moorhead.)

Mr. Holman: May that be marked 13-j, please?

(Whereupon, Daily inspection report for August 10, 1944 (Moorhead) was marked Defendant Macri's Exhibit No. 13-i for identification.)

Q. Do you have one for the 11th, Mr. Moorhead?

A. August 11, 1944; "Stripped structures 7, 8, 9, 10, 11, 12; checked structures 46, 47, 48, 49, 50, 51, 52, 53, on lateral 59.9."

Q. Anything else?

A. Well, there is a note on the bottom here, but it doesn't pertain to this; it refers to another job.

Q. What job does it refer to?

A. Specification 1061.

Q. I don't want that read, then.

Mr. Holman: I ask that be marked 13-k, please.

(Whereupon, Daily inspection report for August 11, 1944 (Moorhead) was marked Defendant Macri's Exhibit No. 13-k for identification.)

Q. Do you have one for the 12th, Mr. Moorhead?      A. I don't believe so. [239]

Q. August 12, that is a Saturday. You don't have that?      A. I don't think so.

Q. I thought there was one in there where you said something about going to 1060. You have none for August 12. You have one for what date next, please?

A. I have one for the 15th here.

(Testimony of R. M. Moorhead.)

Q. August 15; will you read that, please?

A. August 15, '44; "Placed concrete in structures 42, 43, 44, 45, 45a, lateral 59.5, structures 46, 47, 49, 50, lateral 59.9; 17 batches, 18 $\frac{1}{4}$  yards."

Q. Foreman? A. "Schaefer."

Mr. Holman: I ask that be marked 13-1, your Honor.

(Whereupon, Daily inspection report for August 15, 1944 (Moorhead) was marked Defendant Macri's Exhibit No. 13-1 for identification.)

Q. Do you have one for—that's all that you have, Mr. Moorhead? A. I think so, sir.

Q. Passing now, Mr. Moorhead, to your time you were there, did you have occasion to see whether or not, that is, to see how the work was performed by the Concrete Construction Company with reference to place on the lateral 59.3 where they started, how they worked?

A. You mean at which point they began work?

Q. Yes, sir, and what way they worked.

A. Well, it didn't make any particular difference to us which way they began.

Q. No, I asked you if you saw where they started. Do you remember where they started and which way they worked?

A. I believe they began at the lower end of the lateral.

Q. Sir?

A. They began at the lower end of the lateral, or down toward the end of it.



(Testimony of R. M. Moorhead.)

Q. Would that be going backward on the stations, then, or forward?

A. Well, it would be going backward on the stations, from the lower end.

Q. And can you tell me whether or not the excavation was dug ahead, the excavations for structures?

A. Well, on that particular lateral where we were placing concrete the excavations had all been completed.

Q. And was fine grading being done, or had been done?

A. Well, the structure forms were set in the ground, so the fine grading was——

Q. Oh, they had them set in the ground when you were there? Do you recall any instance of any high or low grade when you were there?

A. Well, I can't remember of any particular case.

Q. With reference to what has been marked Exhibit 12, I'll [241] ask you whether or not you prepared those lay-out sheets for this job, Mr. Moorhead?

A. Well, I didn't prepare them; however, I traced these particular sheets.

Q. Oh, you traced these particular ones?

A. Yes.

Q. Well, all I wanted to bring out, those came from the Bureau of Reclamation and are official records that are sent out?

A. That's right, subject to alterations.

(Testimony of R. M. Moorhead.)

Q. Yes, sir; and I notice there in several places there are structures crossed off and marked "revised". What would that mean?

A. That would mean that that structure had been revised and is either eliminated or revised.

Q. Either eliminated, or a substitute structure?

A. That's right.

Q. Can you tell me whether or not while you were there on 1062, schedule 1, new or old lumber was used for the forms?

A. Well, they started out with new lumber with the structures while I was there.

Q. And how long had the forms been built when you came there, Mr. Moorhead?

A. Well, the first time that I went over to this particular [242] job was on the 24th of July, and the forms for about 25 or 30 structures, I would say, were already set for concrete. Now, how long before that—they had been working on them some time—how long before that they had placed the first one——

Q. Can you tell me whether or not at that time they gave any appearance of being weathered, by not being filled with concrete?

A. Yes, they were using ship-lap, 8 inch ship-lap in some of the forms, and they had shrunk so much that cracks were visible through them.

Q. From your experience in the field can you tell me whether or not that would be a normal effect of the elements, temperature, heat, and wind?

A. Well, it is the effect of the heat on unseasoned lumber.

Mr. Holman: You may inquire.

(Testimony of R. M. Moorhead.)

Cross-Examination

By Mr. Olson:

Q. Now, Mr. Moorhead, as I understand it you inspected the first structures that were installed on this project 1062?

A. The first—I believe the first two laterals, or three.

Q. And that would be about the first 25 or 30 structures, is that correct?

The Court: Speak up, instead of nodding your head.

A. That's about right.

Q. The reporter has to get it in the record. Now, you were [243] one of the crew known as the inspectors or field men? A. That's right.

Q. As I understand it, Mr. Moorhead, it was your function to inspect the structures after it had been placed in place in the excavation, and give it an OK before the Concrete Construction Company could commence pouring concrete?

A. That's right.

Q. Then in each instance the Concrete Construction Company on 1062 would have to build the forms in the excavation and then have the OK of yourself or some other inspector before they could pour the concrete? A. That's right.

Q. Now, did you or did you not inspect the excavation before the concrete structure was placed in it? A. No.

(Testimony of R. M. Moorhead.)

Q. In other words, the Bureau was not interested in who made the excavation, as I understand it?      A. That's right.

Q. As long as by the time the forms and the panels were in place that they were right?

A. That's all we were interested in, as far as placing the concrete is concerned.

Q. And how much trouble the Concrete Construction Company had, or had to go to, or how much excavation they had to [244] go to, in order to get these forms in place, the Bureau and yourself as an inspector was not concerned?

A. That's right.

Q. And you made no record of that on your inspection?      A. No record.

Q. As a matter of fact, you weren't even called to the structure until the Concrete Construction Company had completed installation of the forms?

A. When they had the forms set and ready for concrete, why, we went up and checked it as to grade and dimensions, and if it was satisfactory, why, we give them the OK to place the concrete.

Q. So what shape the hole itself was in when the Concrete Construction Company's carpenters first got there to place the forms, you wouldn't know about?      A. No, sir.

Mr. Holman: Just a minute; I object as argumentative.

The Court: Well, it's cross-examination. I'll overrule the objection.

(Testimony of R. M. Moorhead.)

Q. Now, you did have an opportunity to observe, I assume, Mr. Moorhead, the question as to—I mean the situation of the banks of the excavations as they existed along the side of the panels of the structures?

A. Yes, I saw a good many of them, before the forms were in [245] them and afterwards.

Q. And the fact it, is it not, that those walls were vertical, straight up and down, practically?

A. For the most part they were. The deep ones especially were practically vertical sides.

Q. They were not sides what you would call one to one slope?

A. That's right, they were not.

Q. They were not. Now, realizing, Mr. Moorhead, that it wasn't a part of your work to check excavations or to check the work of the carpenters until the structure form was complete, still, being on the job there as you were, did you have an opportunity and did you observe the Concrete Construction Company's crew doing excavating?

Mr. Holman: I object to that as not proper cross-examination, your Honor.

The Court: Overruled.

A. Well, there's hardly any construction but what there is some shovelling going on around; now, whether it's any specific quantity I wouldn't say, but there's always more or less digging around there when you're placing or setting a structure.

(Testimony of R. M. Moorhead.)

The Court: I don't believe that's an answer to the question. Perhaps he can't answer it directly, but will you read it?

(Whereupon, the reporter read the last previous [246] question.)

The Court: You haven't yet said whether you did or whether you didn't. You can answer it or say you can't answer it, one or the other.

A. Well, I wouldn't say they were excavating.

Q. Well, what were they doing?

A. Well, they might have been levelling up the sub-grade, or something of that sort.

Q. You saw them working with shovels?

Mr. Holman: I move the latter part be stricken as conjecture, your Honor.

The Court: Well, I'll let it stand. He can tell what he saw there, and not draw conclusions.

Q. You did see them, Mr. Moorhead, the carpenters, working with shovels in the excavations?

A. Yes, I seen them using shovels.

Q. And did you also see them at times doing back filling in order to get the floor of the excavation to proper grade?

A. Occasionally that has been the case.

Q. Now, as I understand it, when you would see this it would be by chance, because you were not out there to inspect the excavations ahead of time?

A. That's right.

Q. Now, when you got on the job, as I understand you to say, it was about July 21, 1944? [247]



(Testimony of R. M. Moorhead.)

A. 24th, I believe, was the first day that I was over there.

Q. And at that time there were approximately 25 structures the forms for which were already in place?

A. That's right.

Q. And looked like they had been there for some time?

A. Yes, sir.

Q. Now, how long would it take, if you know, to pour 25 structures?

A. Oh, normal operation——

Mr. Holman: Just one minute. Your Honor, I submit it is not proper cross-examination, and I submit that the witness has not qualified himself as a concrete man, as a concrete operator, I mean.

The Court: I thought his qualifications were admitted.

Mr. Holman: Yes, as to concrete inspector, your Honor. Now counsel asked him about operations, which is not proper cross-examination.

The Court: He must be an engineer; didn't he draw some of these drawings and such as that?

Mr. Holman: I'll withdraw it, your Honor.

The Court: I thought you asked him if he didn't prepare this book of plans, the layout, and if he prepared that I assume he would be more than a mere inspector. [248]

Mr. Holman: I meant, your Honor, in his qualifications that he's given there is no operating experience.

The Court: Yes, that's true. Well, I'll overrule the objection.

(Testimony of R. M. Moorhead.)

Witness: I would say about two days, or possibly three, would place all the concrete in that number of structures.

Q. So that when you got there on July 21 there was about two to three days' pouring of concrete that was ready? A. That's right.

Mr. Holman: Oh, just a minute. Your Honor, I submit that that question—may I hear the question?

The Court: That's virtually a repetition of what he said before.

Mr. Olson: I would have said structures ready for pouring of concrete. My question wasn't very well worded, your Honor. I should have said that there was structures ready for two to three days' pouring of concrete.

The Court: If I understand the witness' testimony correctly he testified not that all this work would require two days, but that there was two days' pouring ready with the forms set, and it would take two or three days to pour it; is that right? A. That's right.

The Court: I think we'll recess now for [249] ten minutes.

(Short recess.)

(All parties present as before, and the trial was resumed.)

The Court: Had you finished your cross-examination, Mr. Olson?

Mr. Olson: Not quite, your Honor.

(Testimony of R. M. Moorhead.)

Cross-Examination

(Continued)

By Mr. Olson:

Q. Mr. Moorhead, you said that the ship-lap that had been used and furnished in connection with making these forms was eight inches; that's the width, I take it?

A. That is the width, yes.

Q. And that they had on July 24 or 21, whichever it was you got there, that it had shrunk so that there was cracks in it? A. That's right.

Q. Now, would that necessitate the rebuilding of those forms in order to pour concrete?

A. Well, in some cases it did. Part of them we let go, and a few of them we made them take the boards off and do it over.

Q. Some of the forms you made the Concrete Construction Company remove and replace?

A. Take the boards off and push them back together and close the cracks. [250]

Q. Did you say that shrinkage was caused by the lumber being unseasoned lumber?

A. I would say it was green lumber, and exposure to the sun and wind caused it to dry and shrink.

Q. And that happened quite rapidly? If you had wet lumber out on the Roza Project in Yakima County in the middle of July it would shrink pretty fast? A. That's right.

Q. Now, you mentioned something in one of your reports there about there being some delay,

(Testimony of R. M. Moorhead.)

or something about there being some equipment broken down. The concrete equipment that Mr. Schaefer had on this job was brand new equipment, wasn't it?

A. I believe the mixer was a new machine, practically new, and he had a Buggymobile out there that was new. The trucks were used trucks, for the most part. I don't recall seeing a new truck.

Q. I think that you mentioned his trucks, or that they lost some time waiting for a truck.

A. Well, they had to drive from the scene of operations, where they placed the concrete, back to the stock pile where they filled the aggregates.

Q. Do you know what was the matter with the trucks on that day you referred to?

A. No, I can't say just what the trouble was.

Q. Do you know anything about the trouble the trucks had?

A. Well, I remember one that was loaded too heavily on the rear, started up a grade, and tipped up in the air, the front end in the air.

Q. What kind of roads did they have out there?

Mr. Holman: I object to that as outside the issues under the sub-contractor's evidence, the plaintiff's exhibit 1.

Mr. Olson: That's a matter we will have to argue.

The Court: I'll admit the evidence. I know there is a question who is responsible for building the roads.

(Testimony of R. M. Moorhead.)

Mr. Holman: No provision in the sub-contract for building roads, your Honor.

The Court: I beg your pardon?

Mr. Holman: Fixing the obligation for the roads.

Mr. Olson: Well, we think there is.

The Court: The record will show an objection, and I'll overrule it.

Mr. Hawkins: Will the record also show the objection as to Goerig & Philp? I would like to ask that counsel stipulate any objection made by a defendant will apply to all defendants.

Mr. Olson: That is agreeable.

The Court: All right, the record may show that.

### Cross-Examination

(Continued)

By Mr. Olson:

Q. Were there any roads furnished by Macri and Company for Concrete Construction Company out on the project?

Mr. Holman: Objected for the reason it is not proper cross-examination or within the issues.

The Court: Sustain the objection to that as a little too broad. You can show he knew about it.

Q. Mr. Moorhead, was any of this truck trouble that you referred to in your report caused by there being no roads, if you know?

Mr. Holman: Objected to, your Honor, for two reasons, that it is not proper cross-examination,

(Testimony of R. M. Moorhead.)

and the witness is not shown qualified as either a truck operator or a mechanic.

Mr. Olson: If your Honor please, they put in these records; that's one of the things I was objecting to on the record. Here's a report that has a certain notation, and counsel wants to put that in, and says "You can't ask anything about it."

The Court: I'll overrule the objection. He's shown there was delay on account of truck trouble.

Mr. Olson: I'm trying to find out what it is, if Mr. Moorhead knows. If he doesn't, I'm satisfied.

Witness: Do you want me to answer the question regarding the roads? [253]

Q. No, the Court ruled against me. I'm asking if, in your report you mentioned some delay waiting for trucks, if you know whether the truck trouble and waiting for the trucks was connected with the road situation. Do you know whether or not it was?

A. Well, I can't say that it was the road situation. I don't remember whether they were delayed at the batching plant or whether they were stuck on the road between there and the scene of operations, or what was the delay. Offhand I can't recall.

Q. All right. As I understand it you don't have any records at all showing checking on the excavations, as to their grade?

A. We never checked the grading of an excavation until the structure was set, ready for con-



(Testimony of R. M. Moorhead.)

crete, and then we never checked the sub-grade unless it appeared to be out of line considerable.

Q. And when you got to pouring concrete, or when you got there on this July 24 so that you found these 25 structures ready for concrete pouring, do you know whether or not there were any excavations ahead which had been completed to the extent that the sub-grade and floor was completed and ready for receiving concrete forms?

A. I don't know as to the sub-grade. I know there was some [254] excavations ahead, because you could see them ahead on the different laterals. Whether they had been fine graded or not I don't know.

Q. And by fine grading you mean completion of the floor so that it would receive the structure?

A. I mean brought up or cut down to the neat lines, where the concrete would be placed on the invert.

#### Cross-Examination

By Mr. Hawkins:

Q. What is the character of the soil?

A. Well, it is a light volcanic ash, for the most part. Some of it is a little rocky.

Q. It blows with the wind, I suppose?

A. If it is loose it blows, yes.

Q. And if you don't get in with the structures right away, if it is windy the soil would drift in to a certain extent, wouldn't it?

A. It would blow in some, yes.

(Testimony of R. M. Moorhead.)

Redirect Examination

By Mr. Holman:

Q. Mr. Moorhead, you spoke of lumber being exposed to the sun and wind, and the shrinkage. If the structure when completed had been poured with concrete would that have happened?

A. Well, not necessarily, unless it was poured after they had been sitting there a considerable time.

Q. I mean if it was poured currently, when they were sitting [255] there, it would not have happened?

A. No, within a few days, a few——

Q. I mean normal pouring.

Mr. Olson: Do you mean normal pouring, or within a few days?

Witness: Well, if it was placed within three or four days after the structure was set I would say that it would not shrink much.

Mr. Holman: That's all, Mr. Moorhead.

Mr. Olson: That's all, thank you, Mr. Moorhead.

Mr. Holman: And all these witnesses may be excused?

Mr. Olson: Yes, subject to call.

(Whereupon, there being no further questions, the witness was excused.)

## G. R. REYNOLDS

called as a witness on behalf of the defendants Macri, being first duly sworn, testified as follows:

## Direct Examination

By Mr. Holman:

Q. Would you give your name and place of residence, Mr. Reynolds, and your official position?

A. Well, I live here in Yakima, and I work as a concrete inspector.

Q. For the Bureau of Reclamation?

A. Yes, Bureau of Reclamation. [256]

Q. Was that so in the year 1944?

A. Well, some of the time.

Q. And have you worked, in the year 1944 were you on the Roza Project, specification 1062, schedule 1?

A. Well, just some of the time; I think from August on.

Q. And did you make daily reports?

A. Yes, I made daily reports.

Q. With reference to identification 13 will you find those reports that are signed by you in the period between August, 1944, and February, 1945, Mr. Reynolds? Those bearing your signature?

A. I think there's 200 of them. What date did you want?

Q. Beginning with August, 1944, Mr. Reynolds.

A. August what date?

Q. '44; 1944.

A. Yes, I have that, but what date particularly did you want?

(Testimony of G. R. Reynolds.)

Q. You have an entry for August 15, 1944, that pertains to 1062 and the operation, the concrete structure operation? A. Here it is.

Q. All right; that bears your signature and was made currently, was it, Mr. Reynolds?

A. Well, no, it don't. I think Costello wrote that.

Q. I want your report, not Costello's. Have you got [257] one on the 16th, August 16, 1944?

A. I have one for the 16th.

Q. Will you give that, please? Read it, please, into the record.

A. I may have one for the 15th. I'll look for it. Here's one for the 16th.

Q. All right, read that, please.

The Court: Is that your report?

A. That's my report. "No concrete placed this shift. The loading tower on the mixer mobile was taken off as the going was getting rougher, and too much weight to pull. All the structures on lateral 59.5 was stripped, 39 to 45 and 45-a."

Mr. Olson: What was the date on that?

A. This was the 16th.

Q. Of what month? A. August.

Mr. Holman: Mr. Clerk, I wonder if we're going to run out of the alphabet?

The Clerk: I'm going to indicate this with a mark of my own, and afterwards in making the copies we'll mark all of Reynolds' reports as 13-m.

Mr. Holman: And sub-numbers 13-m-1, 2, 3 and so forth?

(Testimony of G. R. Reynolds.)

The Clerk: No, they will each carry their [258] own date. I thought I would mark the whole batch as 13-m.

The Court: How many of these will you use for this witness, do you think, Mr. Holman?

Mr. Holman: 20 or 25, your Honor.

The Court: It seems to me it is a waste of time and duplication to read these into the record if you're going to introduce them later on. We'll have them both in the record and as an exhibit.

Mr. Holman: Then may I refer to the dates, and have the clerk take those?

The Court: I think it would save time if you would identify them as to date, and offer them in evidence.

Mr. Holman: I wanted to avoid making a lot of copies not pertinent to this case. These men are on different jobs.

The Court: Yes, but I understand these that are read into the record, you propose to introduce in evidence anyway.

Q. Will you tell me whether or not you have an entry for September 22, 1944?

A. September—

The Court: You'll get those as you go along, Mr. Clerk, and you will know what is to be included in the exhibits. Now, this one was what?

The Clerk: This one is September 22.

Q. Pardon me—ahead of that, August 31.

A. August 31. Here's August 31.

(Testimony of G. R. Reynolds.)

Mr. Holman: All right, will you mark that, please, Mr. Clerk?

Q. Then September 1. Do you find it, Mr. Reynolds?      A. Not yet.

The Court: How many more of these witnesses do you have, Mr. Holman?

Mr. Holman: I have two more.

The Court: I wonder if during the lunch hour they couldn't wade through this mass of material and pick out their own reports, instead of doing it while the Court is in session?

Mr. Holman: I will be willing to withdraw Mr. Reynolds now, and do that, your Honor. Mr. Reynolds, would you during the lunch hour check the dates that I'll give you and pick out the reports?

Witness: O. K.

Mr. Holman: Could they go to the jury room and do this now, your Honor?

The Court: I have no objection to that, if counsel hasn't. You can take this identification 13 out and pick out the ones they have made, and then they can be in a position to identify them without all this delay [260] of searching through them while we're in session. The two other witnesses will do the same thing?

Mr. Holman: Yes, Mr. Costello and Mr. Sektnon.

The Court: You can take that with you then, all those daily reports.

Witness: You mean take them now?

The Court: Yes, you may take them now out to the jury room or grand jury room and look



(Testimony of G. R. Reynolds.)

them over. Do you have the particular dates that you can give them, Mr. Holman?

Mr. Olson: While Mr. Holman is getting those figures, your Honor, I intended to have these models identified, and I want the witnesses to be around them. Now, is it more convenient to the Court to have them located where they are?

The Court: I think that's a good place. They can step over there.

Mr. Olson: I want the witnesses to be around them. If that's a good place I can have the witnesses come around.

The Court: I think that's a good place. If you want to, we can have the Clerk identify them now.

(Whereupon, Model of excavation for structure showing 1 to 1 banks was marked Plaintiff's Exhibit No. 23 for identification.) [261]

(Whereupon, Model of poured forms of concrete was marked Plaintiff's Exhibit No. 24 for identification.)

(Whereupon, Model of excavation for structure showing vertical banks was marked Plaintiff's Exhibit No. 25 for identification.)

(Whereupon, Model of poured forms for concrete was marked Plaintiff's Exhibit No. 26 for identification.)

(Whereupon, the witness Reynolds was temporarily excused from the witness stand.)

Mr. Olson: Shall I resume with Mr. Schaefer?

The Court: Yes, all right. [262]

M. C. SCHAEFER

the plaintiff, a witness in his own behalf, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Schaefer, we ended up yesterday, I believe, with your relating the substance of the conversation which took place on April 29, 1944. Now, were you on the project again during May, 1944?

A. Yes, I was, on May 19.

Q. And what took place on that date, or what did you see or observe or do?

A. Well, on May 19 there was no work going on, and the materials, that is, there was no lumber, and I instructed the——

Mr. Holman: Just a minute. I object, your Honor; he was asked what took place.

Mr. Olson: And what he did.

The Court: Yes, I think that answers the question. You're objecting to what instructions he gave someone?

Mr. Holman: Yes, sir. That calls for a separate question.

Mr. Olson: I asked what he did, your Honor. I would just as soon ask another question.

Direct Examination

(Continued)

By Mr. Olson:

Q. Did you inspect any of the excavations, Mr. Schaefer?

A. Yes, I did.

(Testimony of M. C. Schaefer.)

Q. And what was the situation with respect to the excavations?

A. The situation on the excavations was that there was no fine grading ahead of the setting crew, and as to the [263] yard work, there was no lumber in the yard, so I told the superintendent——

Mr. Holman: Again I object.

Q. All right, don't say what was said. Counsel is objecting to that. Now, you say there was no fine grading done in the excavations. Were there any excavations completed so that the carpenters could come and install the forms without doing additional excavating work?

Mr. Holman: I object to that type of question as leading. It suggests the answer.

The Court: It is leading. I'll sustain the objection.

Q. Well, then, explain, Mr. Schaefer, what you mean by saying there was no excavations fine graded.

A. Well, the excavations that we checked on that day were not excavated to sub-grade to receive the concrete at the inverts of the structure, the side walls of the excavation would require additional digging in order to accommodate the forms, and there was just no excavation there ready for forms.

Q. And what did you do about it then? What did you say? Who did you say it to?

(Testimony of M. C. Schaefer.)

Mr. Holman: That first, to whom did he say it, what did he say, I would like to know to whom he was talking. [264]

The Court: Yes, perhaps that would be the logical way.

Witness: I said to Fred Waltie——

Q. That is your foreman?

A. That's our superintendent on the job at that time.

Q. All right, what did you say?

Mr. Holman: Object to it, your Honor, as not binding on any of the defendants unless they were shown present or it was shown communicated within five days.

Mr. Olson: Well, I'll say to the Court and counsel that what I propose to show is that we pulled off the job. Now, I'm not offering any conversation between him and Mr. Waltie for proving any fact that exists other than the fact that there wasn't any work to do and we went home.

Mr. Holman: Object to that. It is immaterial, your Honor. It is a question of his own responsibility under his contract.

The Court: Well, we want to know what happened out there. I think you can show what directions or instruction he gave his men, without going into detail.

(Testimony of M. C. Schaefer.)

Direct Examination

(Continued)

By Mr. Olson:

Q. What did you do then?

A. I instructed my superintendent on the job to come back to Portland with the men that were up there from Portland, [265] and to leave only John Klugg and Monrad at the shop to do such little repair work and tie steel as it was possible for two men to do.

Q. And was that done?

A. That was done, and the——

Mr. Holman: Object to that as volunteered, from this point on. He's answered the question.

(Whereupon, Model of excavation for structure showing 1 to 1 banks was marked Plaintiff's Exhibit No. 23 for identification.)

(Whereupon, Model of poured forms for concrete was marked Plaintiff's Exhibit No. 24 for identification.)

Q. Now, referring to plaintiff's identification number 23, would you explain to the Court, you undoubtedly will have to remove the structure to do it, just what this fine grading is as you use the term, what you refer to with reference to that model excavation, what constitutes the fine grading?

Mr. Holman: Objected to as not proper procedure. First what 23 is should be shown into the record, and by whom it is prepared, and from what sources it is prepared, before it is submitted.

(Testimony of M. C. Schaefer.)

Mr. Olson: That is true, I'll have to do that before I offer this in evidence, which I will do. I'm [266] simply asking this witness to illustrate what the fine grading is, by means of this identification, which assume he can do.

The Court: Well, I think it would be the same as a map or diagram. Before detailed evidence is admitted it should be identified and offered. I think it would be appropriate procedure to show what this is and who prepared it and what it represents, and if it is admitted the witness may use it to illustrate his testimony.

Mr. Olson: Another witness did it, your Honor, and I can't do it by Mr. Schaefer.

The Court: All right.

Direct Examination  
(Continued)

By Mr. Olson:

Q. Now, when did you next come back on to the job?

A. That was June 29. I had two men head back for the job at that time.

Mr. Holman: Would you read that answer, please?

(Whereupon, the reporter read the last previous answer.)

Mr. Holman: I move that be stricken, your Honor. He was asked when he came back to the job.



(Testimony of M. C. Schaefer.)

The Court: Well, I suppose that would mean he and his establishment.

Mr. Olson: I have no objection to it being stricken. I was asking when he came back. [267]

The Court: When he personally came back? All right, it may be stricken.

Direct Examination

(Continued)

By Mr. Olson:

Q. When did you personally come back to the job? A. That I couldn't say.

Q. I'll ask you this, Mr. Schaefer: Did you arrange a meeting with Mr. Macri on the job after you had pulled off and gone to Portland, did you arrange a meeting?

A. Yes, that was on June 15.

Q. All right, did you come back on that date?

A. I came back to the job for that meeting.

Q. All right, now tell us about it.

A. There was Fred Waltie, Allyn Hunter, and I drove to the job office.

Q. Who is Mr. Hunter?

A. Al Hunter is the representative of Rogers Insurance Company.

Mr. Holman: Of what?

Q. Rogers Insurance Company.

A. Of Rogers Insurance Company.

Q. Is he their engineer, or do you know?

A. Well, he's an engineer, I imagine.

(Testimony of M. C. Schaefer.)

Q. Well, if you don't know, Matt, go ahead; just tell what the set-up is, what took place.

A. We met Mr. Macri and his engineer, Mr. Cohen. We went [268] out to the site, and we checked six or seven of the structures, and I pointed out the condition of the excavations, the condition of the set forms where we had set some outside forms so that the Macri crew would know where to crib and back fill, and where they had so back filled, and the back fill hadn't been compacted, and I brought that to Mr. Macri's attention. He says, "Well, that hasn't anything to do with you, that's part of the inspector's job". I said, "That's true, but I sure expect to hear about it if the structure cracks; however, that's minor detail. When are you going to get your crew in here, these shovels you talk about, and ample men, lumber on the job, so we will not be stymied?"

Q. Was Macri excavating at that time?

A. There was nothing going on. The shovel, I'm positive, was broke down, and was in the yard.

Q. Did he have any hand excavating crew on the job?

A. He did not. There was no one on the job. I said, "Back before we figured the job, your superintendent thought and asked whether we cared to figure on this work"——

Mr. Holman: Just a minute. I object to that as repetitious, your Honor.

The Court: This has not been gone into before, has it?

(Testimony of M. C. Schaefer.)

Mr. Holman: Well, he previously told about the superintendent [269] writing.

The Court: Well, this is a different conversation from what he testified to before, I understand. Objection overruled.

A. (Continuing): "Your superintendent, Mr. Staples, in this letter to me before we figured the job said that"——

Mr. Holman: Just a minute. I object. That is not the best evidence. He can produce the letter.

The Court: He's telling what Macri said.

Mr. Holman: No, what he said.

The Court: Well, what he said to Macri. He can detail the conversation even though it mentions the document. Overruled.

A. (Continuing): —— "said they would be ready for concrete in two or three weeks. Here we are, stymied like this". He said "Yes, you told me Staples was a good man". I said "I never said anything of the kind, but if he had any co-operation from you he would have done a whole lot better, because you've been telling him to lay off, and then giving him these instructions. I don't believe you've ever given him instructions to excavate according to specification, otherwise he would be doing it". Mr. Macri said "We're getting started; what are you hollering about?" I said "Well, we're to have two jobs out of the road by September 15. We won't be through with even this [270] job by September 15". He said "Nobody's lost any money on my job. We'll be out by September 15. This little excavating, you go ahead and do it. We'll

(Testimony of M. C. Schaefer.)

pay for it". I said "That isn't all you're going to pay for. You're going to pay all the costs, all the expenses, all the extras". He said "Well, I told you that before; quit arguing".

Mr. Hawkins: Your Honor, I again move that this testimony be stricken, as I did yesterday. They are attempting to vary a written contract by parol evidence.

The Court: Overruled.

Q. (Continuing): Well, he said that he would have an engineer on the job Monday, that he would have another shovel on the job, and that there would be ample lumber, and for us to get back on the job. I said "No, we're not coming back on the job yet; you get some holes ahead". He says "You're not going to have to wait for anything any more. You just get back here and get going". I says "We'll want to have enough holes ahead for at least eighty structures of concrete, or so we'll have at least four days of pour, and we want to pour twenty yards as our average; that means every day's pour".

Q. How many days' pour were there ready for you then, on June 15, if you know?

A. Well, I wouldn't just say. I think that there was probably [271] about——

Q. Well, let's go ahead and finish this conversation before noon.

A. So then I said "All right, Mr. Macri, you've agreed to pay for all the additional cost and expense.——"

(Testimony of M. C. Schaefer.)

Mr. Hawkins: Your Honor, I hate to keep interrupting, but I do object to this testimony, which attempts to vary this written document. We went into this at some length yesterday.

The Court: I think we did.

Mr. Hawkins: I do want to protect the record.

The Court: You can protect the record by making objection.

Mr. Hawkins: Yes, that's what I'm doing.

The Court: This conversation was long after the contract was entered into and partly executed, wasn't it?

Mr. Hawkins: It was long after the contract was entered into, and it is a contract which was required to be in writing, and subsequent agreements parol are not admissible to vary that contract.

The Court: Perhaps I'm wrong. I thought the purpose of this was to show modification of the contract and a separate agreement to pay for extras, not a part of the contract at all. He's trying to show there was another contract modifying it. [272]

Mr. Olson: That's true.

Mr. Hawkins: And I contend that has to be in writing.

The Court: On what ground?

Mr. Hawkins: On the ground, well, not only does it vary the terms of this written contract, but it is an agreement that is required to be in writing under the statute of frauds.

(Testimony of M. C. Schaefer.)

The Court: Not if it is performed, is it?

Mr. Hawkins: It wasn't performed at this time.

The Court: Well, it probably will be shown later on. It will be overruled. Proceed.

Direct Examination

(Continued)

By Mr. Olson:

Q. Finish relating the conversation, then, Mr. Schaefer. You ended up—can you give the last part there?

(Whereupon, the reporter read the last previous partial answer.)

A. (Continuing): —“that you'll have another shovel on the job, you'll have an engineer on the job, you'll have plenty of lumber, and that we're not going to be required to do any of this excavating; that you're going to have your excavations out a foot and on a 1 to 1 slope, as called for in the specifications”. Then we started walking away from this spot, and Al Hunter and Mr. Macri were walking ahead of Mr. Cohen, Waltie, and I, perhaps [273] 15 or 20 feet, and Mr. Cohen said “Well, Mr. Macri——”

Mr. Holman: I object to that as hearsay, if it was not shown to be in the hearing of Mr. Macri.

The Court: Mr. Cohen was talking to Mr. Macri, as I understand it.

Witness: No, Mr. Cohen was talking to myself.

The Court: Was Mr. Macri there?



(Testimony of M. C. Schaefer.)

Witness: Ahead of us about 15 or 20 feet.

The Court: Not within hearing?

Witness: Well, he and Mr. Hunter were having a conversation at the time.

The Court: Well, I'll have to sustain the objection.

Mr. Olson: Your Honor will have in mind Mr. Cohen was the engineer brought over by Mr. Macri.

The Court: Well, I'll overrule the objection if the conversation was with the engineer.

Witness (Continuing): That's right. Mr. Cohen said "Well, Mr. Macri has indicated or told me that he wants me on this job, and if I am, why, I'll see that this work is done according to specifications". He says "This is no way of doing this kind of work" and he said——

Mr. Holman: Your Honor, I again move that that be stricken as hearsay, so far as Macri is concerned, because it is not a declaration against interest of Macri [274] by anyone who was on this job, in handling this job. In other words, the witness was told that Mr. Cohen came with Mr. Macri from Seattle, and he was to go on this job.

The Court: I think I'll strike this, if it refers to instructions or some statements that were made by Mr. Macri to Cohen, and Cohen is talking about it outside of Macri's presence. The motion to strike will be granted. It is time to recess now. We'll recess until 1:30.

Mr. Holman: May I recall Mr. Reynolds, your Honor?

(Testimony of M. C. Schaefer.)

The Court: All right, we'll get these couple of the witnesses out of the way. Have you any objection, Mr. Olson?

Mr. Olson: No, any way to expedite it. Of course, I want to get through with Mr. Schaefer sometime. I'm agreeable.

G. R. REYNOLDS

a witness called on behalf of the defendants Macri, resumed the stand and testified further as follows:

Direct Examination  
(Continued)

By Mr. Holman:

Q. Did you list the dates you found, Mr. Reynolds?

A. I believe I have them all but one. I think there is one on the start I couldn't find.

Q. Then I'll ask you if you found entries for the dates of August 16, September 1, 2, 5, 13, 15, 19, 21, 22?

A. Beg your pardon; I had these in order as you had them down, but I see someone has smeared them up again.

Q. Didn't you make a list?

A. No, I just put them down as you had them.

Q. Is that too fast for you?

A. No; let's see, what one did you say first?

Q. August 16; September 1——

A. I have August 31. I start out with——

(Testimony of G. R. Reynolds.)

Q. All right, had you testified—far as you got on testimony was September 1. Do you have September 2?

A. No, I haven't. Maybe that was the one I couldn't find.

Q. The 5th?

A. Wait a minute; I had these in rotation once. They're kind of out of order here.

Q. Well, call what you have, and I'll check them.

A. I think I can put them together in just a second; 9/2; 9/5; 9/22, and August 31, then I think it goes to 9/13. [275]

Q. All right. A. 9/15.

Q. Check. A. 9/19.

Q. Yes. A. 21.

Q. 21. A. 25.

Q. 25. A. 10/18.

Q. 10/18. A. 10/19.

Q. 19. A. 23.

Q. 23. A. 24.

Q. 24. A. 26.

Q. 26. A. 30.

Q. 30. A. 31.

Q. 31. A. 11/1.

Q. 11/1. A. 2; 3. [276]

Q. Check. A. 4.

Q. Check. A. 6; 9.

Q. All right. A. 10.

Q. Yes. A. 11/11.

Q. Yes. A. 13.

(Testimony of G. R. Reynolds.)

Q. Yes, sir. A. 17.

Q. Yes. A. 22.

Q. Yes. A. 24.

Q. Yes. A. 29.

Q. Yes. A. 12/4.

Q. Yes. A. 12/5.

Q. Yes. A. 6; 12. [277]

Q. 12. A. 15.

Q. Yes. A. 28.

Q. Yes. A. 1/12/45.

Q. Yes. A. 1/16.

Q. Yes. A. 17.

Q. Yes. A. 20.

Q. Yes. A. 22.

Q. Yes. A. 23 and 24.

Q. Yes. A. 26.

Q. Yes. A. Or 25.

Q. Yes. A. And 26; 29.

Q. Yes. A. 2/2.

Q. That's February 2, yes. [278]

A. 1945; 2 and 3.

Q. Yes. A. 6.

Q. Yes. A. And 8.

Q. Very well.

Mr. Holman: I ask that I be given identification for those, and typed copies substituted.

The Court: Yes; I understand that those will all be marked as defendant Macri's identification 13-m.

(Whereupon, Daily inspection reports (Reynolds) were marked defendant Macri's Exhibit No. 13-m for identification.)

(Testimony of G. R. Reynolds.)

Mr. Holman: That is all, Mr. Reynolds.

The Court: Just a moment. Do you have cross-examination?

Mr. Olson: I was just checking with some of them I have marked here.

The Court: Did you get all of the sheets?

Mr. Olson: I think I've got the date of them here, yes. Now, as I understand, are these sheets offered into evidence now?

The Court: No, the offer hasn't been made.

Mr. Holman: Then when they're typed I'll make the offer. [279]

Mr. Olson: You're offering them in their entirety?

Mr. Holman: The sheets as called, yes.

### Cross-Examination

By Mr. Olson:

Q. Have you got the sheet for 9/22/44 and 10/18/44 there, Mr. Reynolds? A. 9/22?

Q. Yes.

Mr. Holman: What is the other date?

Q. 10/18. Could I see those two, please? I noticed on the daily report, Mr. Reynolds, under date of 9/22/44, you have the notation "Finished grading ahead of carpenters not done". What is meant by that statement?

A. Finished grading not done ahead of carpenters.

THE COURT: All right.

(Testimony of G. R. Reynolds.)

Q. What do you mean by the finished grading, Mr. Reynolds?

A. Well, that's the fine grading for the structures, the finished grading.

Q. Does that finished grading consist of hand excavation? A. Yes, it is.

Q. In other words, the rough hole was made by means of a power shovel?

A. Or some means. I wasn't there when they were made, to be honest with you.

Q. And by this finished grading ahead of carpenters not being done, I take it, then, you mean by that that the floor of the excavation had not been finished to receive [280] the structure?

A. That's right.

Q. And it's a fact that that had to be done before the carpenters could install the panels; then followed by "Two carpenters had to strip forms this afternoon because of tamp back-fill not done"; what does that mean?

A. Sometimes when it is over-dug someplace or other, or the wall has to be tamped in, if the material is too dry they have to haul water and tamp that in; it can't be throwed in loose.

Q. Does that again refer to the floor of the excavation?

A. Well, in some cases it would and some wouldn't.

Q. When you say "dug too deep" I take it you mean the sub-grade against which the concrete



(Testimony of G. R. Reynolds.)

slab was to be laid directly on the dirt was too deep?

A. If it is too deep directly on the floor of the structure it doesn't make too much difference, because it is just a waste of concrete, but that also goes out into the—do you get what I mean?

Q. Let's be sure we get it into the record. Suppose the sub-elevation or the sub-grade on the floor of the structure was too deep?

A. No, if it is too deep it has to be tamped up, or he couldn't get that structure in there; it's got to fit, or something. [281]

Q. If it is down too deep what would they have to do with reference to the placing of the concrete?

Mr. Holman: I object to that as improper cross-examination for the reason that the witness has not been qualified as a structure excavation man.

The Court: Well, he's a concrete inspector.

Mr. Holman: Yes.

The Court: And he should know, I assume, how concrete should be placed in the excavation. This relates to that. I'll overrule the objection.

Mr. Holman: That's all this relates to. If counsel wants to qualify him and base his case on his knowledge as an excavation man, that is his business, but it isn't proper cross-examination.

Mr. Olson: Did your Honor overrule the objection?

The Court: Yes, I overruled the objection.

(Testimony of G. R. Reynolds.)

Cross-Examination

(Continued)

By Mr. Olson:

Q. Mr. Reynolds, you say it would take more concrete. By that do you mean that they'd just have to fill up the over-excavation with concrete?

A. Yes, if it is the center of the structure they would have to, and that would make an over-run in concrete.

Q. Do you know if the Bureau paid for that over-run?

A. No, they don't pay for the over-run; in a hole like that they wouldn't. [282]

Q. They would not pay for it?

The Court: You'll have to answer aloud so the reporter can hear you.

A. Yes; I mean no; no, they wouldn't pay for it.

Q. The reporter can't get a head-shake or a nod into the record. Now, in other words, the floor of the slab of concrete on the floor of these structures had to be a certain thickness, is that right?

A. That's right.

Q. What thickness was it?

Mr. Holman: The specifications, may it please the Court, are the best evidence.

The Court: Well, I'll overrule it. We could look at the specifications, but it will take too much time.

A. Well, it is always shown right in print on the structure what it calls for. Some are five

(Testimony of G. R. Reynolds.)

inches, practically all, now, but at that time I don't know just what it was, five, six, seven inches.

Q. If it called for five, and the grade was far enough down so that they had to put a foot of concrete in there in order to reach that elevation, that was agreeable with the Bureau?

A. That's right.

Q. Except they didn't pay for the extra concrete. Now, referring to your daily report under date of 10/18/44, it [283] says "Carpenters setting on lateral 63.6. Most of these structures had to be excavated, as sub-grade was left high, and hardpan". What do you mean by that notation?

Mr. Holman: May it please the Court, not wishing to interfere with counsel's cross-examination, I am mindful of your Honor's suggestion that instead of interrogating the witnesses and having it in the record, and then again in by way of offer and admission, that it wasn't necessary to do it twice, what counsel is doing is picking certain of these and reading them into the record. They speak for themselves, your Honor.

The Court: I think he has a right to have the witness explain what he means by certain notations on there. That's what he is doing here. If you wish to call others to the Court's attention you may do so; you can read them to the Court as you go along, after they're offered in evidence.

Mr. Holman: Yes, after they're admitted.

The Court: He has to have his explanation while the witness is here. Proceed.

(Testimony of G. R. Reynolds.)

Mr. Olson: That goes back to my original objection. Reading this is not complete. I was asking the witness to testify to what he knew.

Q. Do you have in mind what I just read, Mr. Reynolds? A. Yes, I have. [284]

Q. What does that refer to? What do you mean by this?

A. If your sub-grade is high it has to be taken down to what it calls for. You can't have thin concrete on the bottom.

Q. And where you say "Carpenters setting on lateral 63.6, most of these structures had to be excavated as sub-grade was high, and hard-pan," who was doing this excavation?

A. You mean who did it?

Q. I mean who was doing it.

A. I don't remember just who did do it.

Q. I don't mean the identity. Was it the carpenters doing the excavation?

A. I don't recall.

Q. What you intended to convey was that the carpenters were at the excavation putting in the panels, and that the sub-elevations were too high and had to be excavated?

A. Had to be taken down.

Q. And that was after the carpenters were right at the hole setting their forms?

A. Probably so.

Mr. Holman: I move that be stricken as speculative. He said "probably". A. Yes.

(Testimony of G. R. Reynolds.)

The Court: I'll let it stand.

Q. That is the fact; that's what you're intending to convey? A. Yes, that's right. [285]

Q. Now, did you, Mr. Reynolds, from time to time, observe the Concrete Construction Company's carpenters doing excavating in the excavations?

Mr. Holman: Objected to, your Honor, as not proper cross-examination under the procedure that we are following now.

The Court: Overruled.

Witness: May I have the question again?

(Whereupon, the reporter read the last previous question.)

A. I don't remember.

Q. Now, Mr. Reynolds, you also inspected the concrete installations on specifications 1068, did you not?

Mr. Holman: Just a minute, I object as improper cross-examination. We're talking about 1062.

A. Yes, I did.

The Court: 1068 wasn't gone into on direct examination, as I understood it.

Mr. Holman: No, your Honor.

The Court: I think it is improper cross-examination. However, I don't see anything to be gained by bringing these witnesses back here again and again. If you wish to make him your own witness you may do so. This is all out of order anyway so far as the defendant is concerned. [286]

(Testimony of G. R. Reynolds.)

Mr. Olson: Do you intend to introduce these sheets on 1068, or not?

Mr. Holman: I intend to introduce everything identified by these various witnesses, yes.

Mr. Olson: None of the sheets you have put in so far relate to 1068, is that right? If they do, it is proper cross-examination.

Mr. Holman: I asked only about 1062.

Mr. Olson: Well, I'll make Mr. Reynolds my witness as far as 1068 is concerned, then.

The Court: All right.

Cross-Examination  
(Continued)

By Mr. Olson:

Q. Mr. Reynolds, you also inspected the excavations, or the concrete work, on 1068?

A. Yes, I did.

Q. Now, were the walls, the banks, of the excavations on 1068 excavated to a one to one slope?

A. No, they were vertical.

Q. They were vertical excavations, and is that also true with reference to the excavation on 1062?

A. Yes, they were vertical also.

Q. They were vertical. I understand that your inspection was in the same position as that made by the other inspectors, that you did not make any detailed inspection or take any measurements with reference to the excavations? [287]

A. No, we didn't.



(Testimony of G. R. Reynolds.)

Q. Your function was to inspect the form after it was in place, and to give it your official O. K. prior to the pouring of the concrete?

A. That's right.

Q. And how much trouble, if any, the Concrete Construction Company had in getting those forms in, and to the proper grade, was not a part of your official inspection? A. No, it wasn't.

Q. Now, you did most of the inspecting, as I understand it, Mr. Reynolds, on 1062 and 1068?

A. Yes.

Q. And these other gentlemen came in when you were relieved because you were on some other job, or off the job, or something of that nature?

A. Yes, with the exception of Mr. Moorhead, and he was running the job when I came out; I mean he had the job and I took it from him on the beginning of 1062.

Q. Of 1062? A. Yes.

Q. Were the excavations that were made on 1068 made, in general, the same as on 1062?

A. Near as I could tell, they were.

Q. Now, would you state, Mr. Reynolds, in general, the [288] manner in which the placing of structures and the pouring of concrete took place on 1068? A. On 1068?

Q. How it was handled. A. On 1068?

Q. Yes.

A. The structures were made up as a whole unit and hauled into the field and placed right into the hole, in other words, on 1068, while in 1062

(Testimony of G. R. Reynolds.)

they were made in sections and hauled in and put together in the hole.

Q. Well, how did they get along on 1068? When you came to inspect the structures were they always right for grade?

A. No, they weren't always right.

Q. Amplify that, as to how you did find the structures when you came to give them your official inspection and O. K. for the pouring of concrete.

A. Well, it's a hard question, because they weren't all out, and so forth. Some of them was twisted, had to be brought back at right angles, and some of them was loose back fill in them, where you know it should have been tamped in.

Q. What did you have to do about it, Mr. Reynolds?

A. Well, we had to make them fix them before they could pour; that's the main thing.

Q. And how frequently did that occur on 1068?

A. Well, towards the end of the job it was practically every day.

Q. What was the situation with reference to foremanship and supervision on 1068?

A. Very poor.

Q. Was there any there, Mr. Reynolds?

A. Yes, they had a superintendent, and they had a—do you want to know who was in charge? I didn't get the question.

Q. Well, you can go ahead; who was in charge?

A. Well, Vernstead, a man by the name of Vernstead, was the superintendent. He practically run

(Testimony of G. R. Reynolds.)

everything, far as that's concerned. All orders were ordered out direct by him.

Q. Well, now, you say that the structures on 1068 were not to grade; the back filling, or not the back filling, but the tamping or back fill was loose?

A. That's right.

Q. Is there anything else that was wrong with the structures as you went down the line to O. K. them?

A. Well, I don't remember; that's more or less quite a while ago.

Q. There were, however, quite a number of them that you had to have re-done?

Mr. Holman: Just a minute; object as having already been covered, your Honor. [290]

The Court: Well, it is leading, I think. Probably repetition, too.

Mr. Olson: As I understand the rule, on an expert witness I have a right to ask leading questions, not only on the theory, but the practical standpoint. He knows more about it than I do.

The Court: Well, I think you can ask for opinion evidence, but I don't think the rule was changed as to leading questions.

Mr. Olson: You may examine.

### Redirect Examination

By Mr. Holman:

Q. My Reynolds, it was your duty, was it not, to make appropriate memoranda every day on factual matters pertaining to your field work?

A. Anything of any importance.

(Testimony of G. R. Reynolds.)

Q. Yes, sir; anything that you in your judgment as a field inspector found which you felt should be called to the attention of the office, and the superiors through the office, it was your duty to make factual notes, correct?      A. That's right.

Q. As to your opinion on things one way or the other, independently of facts, it was not your duty, was it?

A. Well, I don't quite get it clear.

Q. Well, I mean if you had some opinion on something as to relative rights between parties, or something like that, [291] that wouldn't be your duty?      A. No.

Q. Nor is it a Bureau practice, is it?

A. It is not a Bureau practice to interfere.

Q. No, sir; that's all. Oh, one thing more. That earth out there in which the excavations were being made in 1062 and 1068 was of what type of material principally?      A. On 1068?

Q. Just describe the material.

A. I don't just remember. I think it is kind of a sandy loam.

Q. Sandy loam?      A. I don't just recall.

Q. You don't recall?

A. No, I don't just recall.

### Cross-Examination

By Mr. Hawkins:

Q. What do you mean by back fill, Mr. Reynolds?

A. Oh, tamp back fill, you mean around structures, or in structures? Well, sometimes it is 'way

(Testimony of G. R. Reynolds.)

over-dug on the size; it has to be back-filled, they call it; it has to be tamped. It can't be throwed in loose.

Q. As I understand, the back fill is filling in up against the wall after taking the forms out.

A. I think most of this case refers to back fill of a structure before it is poured, isn't it? [292]

Q. That is, around the footing, you mean?

A. Well, for instance, if you got a hole that's supposed to be about four feet deep, and it is about six feet deep all the way out, you got to set those structures up on something.

Q. You fill the dirt in to bring it up to the required level?

A. And tamp it. It can't be all throwed in at once. There has to be special pains taken there.

Q. You're not talking about throwing dirt against the wall?

A. No, that comes after a different heading; some does and some doesn't.

Mr. Hawkins: That's all.

#### Redirect Examination

By Mr. Holman:

Q. I would like to ask a question on that. The specifications require tamping in not to exceed six-inch layers, does it not?

A. Not to exceed six-inch layers; I believe that's what they say.

Q. In other words, you put in a layer and tamp that down, and put another layer——

A. Wet it.

(Testimony of G. R. Reynolds.)

Q. That's something that's done right along in structure excavation?      A. Yes. [293]

Q. Usual practice?      A. Usual practice.

Q. As well as a Bureau requirement?

A. Well, I wouldn't say as to that, because the Bureau is about the only one I ever worked for.

Q. I say, as a Bureau requirement?

A. Yes.

### Recross-Examination

By Mr. Olson:

Q. Mr. Reynolds, that back filling and tamping, if you had two feet off grade, and you had to tamp and back fill six inches at a time, how long would it take to do that and let it set between layers?

A. It all depends on how dry it is. You may have to haul water to put that in. If it is dry it won't pack. The drier it is the more water it takes.

Q. Well, if the carpenters arrived at an excavation where the sub-grade was two feet low, and this back filling had to be done, could it be done while they were putting the panels there into place?

A. Well, it all depends on what part of the structure it was in. If it was in the back of the structure they could probably put the head wall in ahead, but as a general practice they back filled before they ever put those structures in.

Q. The general practice is that your tamping and back [294] filling, as far as the sub-grade, is done before they put in the structure?

A. As a rule, yes.



(Testimony of G. R. Reynolds.)

Q. And in some instances would that require cribbing in order to make the back fill?

A. Well, if they had to trim there wouldn't be any back fill there. If they had to cut out they would be cutting back to natural earth; is that what you mean?

Q. Well, what I'm referring to, Mr. Reynolds, some of these excavations contained several structures, didn't they?      A. That's right.

Q. And the sub-grade on one of those structures would be at a different elevation than the sub-grade on another structure in the same hole?

A. That's right.

So that if all the sub-grades were down to the same elevation, and you had to raise the sub-grade on one of the structures and not on another, would it require some cribbing in order to do that?

A. Yes, they would have to trim out, I should think; let's see, just how would they do that? There's quite a mess of them in one hole.

Q. Yes, there were several.

A. If it was low—you're talking about back fill now; if it is too low you could pour the concrete into that [295] bottom, couldn't you, and let it come up around. You may have to wait an hour or two for some of it to set up before you could go along with the next one, but that case doesn't very often occur.

Mr. Olson: That's all.

The Court: Any further questions?

Mr. Hawkins: One further question.

(Testimony of G. R. Reynolds.)

Recross-Examination

By Mr. Hawkins:

Q. This soil out there was so dry that it had to be tamped and wet with water?

A. Well, let's see, I went out there, I don't just recall, in August; most of it was too dry to throw in loose; certain kinds of weather you don't have to haul water; that's the best time to do your back filling.

Q. Well, how can you maintain a vertical cut if soil is as loose as that?

A. How can you maintain what?

Q. Maintain a vertical cut; you said it was all vertical excavations, if this soil was as loose as that?

A. I didn't say it was loose; it was dry.

Q. It is sandy loam? A. Not necessarily.

Q. Oh, I understood you said it was.

A. Well, I said some was down six feet; I didn't classify the soils down there; we wasn't interested in it, as we [296] told the court before.

Q. If it were sandy loam you couldn't maintain a vertical cut very well, could you?

A. I wouldn't say without trying it.

Redirect Examination

By Mr. Holman:

Q. You have not worked in construction yourself as an operator at any time, have you, Mr. Reynolds? A. No, just an inspector.

(Testimony of G. R. Reynolds.)

Mr. Holman: That's all.

Mr. Olson: That's all.

The Court: That's all, then.

(Whereupon, there being no further questions, the witness was excused.)

### J. A. COSTELLO

called as a witness on behalf of the defendants Macri, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Holman:

Q. Your name is J. A. Costello?

A. Yes, sir.

Q. And you reside at Sunnyside?

A. Yes, sir.

Q. And you were subpoenaed to attend at this trial?

A. Yes, sir.

Q. And you have, as arranged before the luncheon recess, gone over your daily reports which were made with respect to specification 1062-1, have you?

A. Yes, sir.

Q. Will you tell me whether or not from those—those are the official reports that you made, they are signed by you, are they not?

A. These are what is termed as a daily report..

Q. Yes, the daily report.                      A. Yes, sir.

(Testimony of J. A. Costello.)

Q. That you made and signed; you were relief man in there were you not, between Mr. Reynolds and Mr. Sektnan?

A. No, sir, I was relief man for Mr. Reynolds only.

Q. Will you tell me whether or not you found entries for October 6, 1944?

A. Yes, I have it here.

Q. October 10, 1944?                      A. Yes.

Q. October 12, 1944?                      A. Yes.

Q. October 13, 1944?                      A. Yes, sir.

Q. And January 2, 1945?

A. I didn't locate that.

Mr. Holman: All right, sir, that's all. How will these be marked, Mr. Clerk?

The Clerk: They will be 13-n.

(Whereupon, Daily inspection [298] reports (Costello) were marked defendant Macri's Exhibit No. 13-n for identification.)

Mr. Olson: Is that all?

Mr. Holman: That's all.

Mr. Olson: I would like to make Mr. Costello my witness, then, your Honor.

The Court: All right.

### Cross-Examination

By Mr. Olson:

Q. Mr. Costello, you were a field inspector on the job, 1062?                      A. For a period of time.

(Testimony of J. A. Costello.)

Q. Part of the time, as relief field inspector, I should say?           A. Yes, sir.

Q. Now, in connection with that work you went out on the field and inspected a structure, did you, for pouring of concrete?           A. Yes, sir.

Q. Just explain to the court what your inspection consisted of.

Mr. Holman: Just a minute; may I have the period that he worked?

Mr. Olson: Well, I take it you've got it here.

Mr. Holman: The same period, you're talking about, that he testified about? [299]

Q. Is that right, Mr. Costello?

A. The period from the 6th to the 13th of October.

Mr. Holman: One week?

A. Approximately.

Q. All right. Now what did your inspection consist of? What did you have to do when you went out and inspected a structure; just briefly?

A. Well, the setting of forms, the pouring of concrete, the stripping, the curing, the placing of hardware, such as weirs, see they're to grade, hydraulically in line.

Q. Now, what was the situation with reference to the bank of the excavation around the structure? Was it to a one to one slope, or not?

A. Well, I'd have to go back and tell you about that one to one slope you're asking for. This hoe that went down through had, as I recall, dug those structures several months before we were on the

(Testimony of J. A. Costello.)

job, and they dug them vertically at that time, but that's not entered in here.

Q. What I'm getting at is the bank was excavated vertically?

A. Yes, the hoe motion was vertical.

Q. Now, did you in this period of time you were inspecting have an opportunity to observe the carpenters of the Concrete Construction Company working on the installation of panels?

Mr. Holman: Just a minute. Your, Honor, if [300] counsel makes this witness his witness I have no objection, but that is not proper cross-examination.

The Court: He's already made him his witness.

Mr. Holman: I beg your pardon; and is this on 1068?

Mr. Olson. 1062.

A. Well, as the duties of an inspector, the concrete inspector takes over when the forms arrive, or when they start placing them in, and the carpenters usually set up their string lines from these elevation stakes and set their forms. Well, were's not interested as far as the sub-contractor or the contractor is concerned, whose job it is to fix the sub-grade, but when the sub-grade doesn't match with the form, why, it's got to be remedied, and then's when we ask for it to be done.

Q. Now, getting back to my question, did you observe——

A. Yes.



(Testimony of J. A. Costello.)

Q. The carpenters of the Concrete Construction Company doing excavating as they were putting in these forms, in order to get them to the right grade?

A. Well, I called attention to Mr. Darcy one day regarding it, the first day I was on the job, and he came out in the morning about nine o'clock, that I had found two structures that wasn't right, and they would have to be taken care of; it wasn't our problem who done it. Darcy [301] said he had a lot of that to do, but he would take care of it before I gave the O.K. on the structure.

Q. What I'm getting at, did you actually see and observe the carpenters—— A. Yes.

Q. ——having to do excavating work?

A. Yes, they was using a shovel.

Q. And what type of excavating work was that they were doing?

A. Well, the excavation was the type of work for what you'd call sub-grade.

Q. And would that be preparing the floor of the excavation—— A. That's right.

Q. ——to the proper elevation?

A. Yes, that's right.

Q. And state whether or not that is work that has to be done preliminary to installation of the structure?

A. Well, if they don't do it, they don't have good luck in putting their structure in on proper elevation.

(Testimony of J. A. Costello.)

Q. And if the structure isn't in on proper elevation, will you permit them to pour concrete?

A. No, after they get the structure completed we check it for elevation, and all those measurements. If it is not right, then of course we know it, and call their attention to it, and we don't O.K. it until they remedy it. [302]

Q. If it is the wrong elevation you make them do it over?

A. That's right; have to change it.

Q. Mr. Costello, did you observe anything about the Concrete Construction Company's carpenters doing excavation for sub-wall trenches?

A. Well, as I recall, what short time I was down there, there was once or twice that they had to dig a wall in order to put their form in. As I recall it was pretty low in the lateral, down towards the highway.

Q. How about the clearance that existed between the bank and the outside form of the structure?

A. Well, these particular ones, as I recall it it was the back end of the structure; in order for them to get down and put what is known as their she-bolts and their whalers, it was so close they couldn't do it, they had to dig it out so they could put their she-bolts in.

Q. The carpenters had to dig it out?

A. Yes, they done that.

(Testimony of J. A. Costello.)

Redirect Examination

By Mr. Holman:

Q. Mr. Costello, your instructions from the Bureau were to deal with the principal contractor, were they not?           A. Sir?

Q. Your instructions from the Bureau of Reclamation was to deal with the principal contractor; in other words, if anything was found wrong, you were to tell the principal [303] contractor? I'm talking about any official order would go from the Bureau of Macri and Company, wouldn't it?

A. No; you see, we was informed that Concrete Construction Company had the job of pouring the structures, and that's naturally who we listened to.

Q. And you gave them instructions direct?

A. That's right.

Q. Now, the thing I would like to know is whether or not in the week you were there, from October 6 to October 13, you had any such occasion?

A. To deliver instructions to the main contractor?

Q. Yes, sir; or to the sub-contractor.

A. Well, yes, I did talk to the sub-contractor. Mr. Darcy is their representative.

Q. You made no note of that, did you?

A. On my forms?

Q. Yes, sir.           A. No, I don't think so.

(Testimony of J. A. Costello.)

Q. You made no report to your superior about that?

A. No, I was only there temporarily, Mr. Holman.

Q. I understood that, just temporarily.

The Court: Any further questions?

### Cross-Examination

By Mr. Hawkins:

Q. What about the soil out there, is that sandy? It's volcanic ash, isn't it? [304]

A. Well, the origin of the soil is——

Mr. Olson: That's objected to on the ground that if it is cross-examination, that no one has gone into it, either Mr. Holman or myself, about the type of soil.

The Court: It is overruled. It has to do with the slope there.

Mr. Olson: I'll withdraw it.

A. Well, as far as a soil chemist, I'm not.

Q. So it is a volcanic ash?

A. So to get a technical answer you would have to ask him.

Q. I'm not asking about the agricultural properties. I'm asking whether or not it will hold a vertical slope; it is a sand?

A. Yes, I've seen places where they run a pipe line two foot deep, and six foot deep, and the ditch standing right there, in a sandy loam.

Q. On this job?

A. Yes, on this particular job.

(Testimony of J. A. Costello.)

Redirect Examination

By Mr. Holman:

Q. Well, it was the usual hoe excavation?

Mr. Olson: That's objected to——

A. That's right, it is a hoe——

Mr. Olson: Just a moment, that's objected to, as whether or not it was the usual hoe excavation. You [305] say hoe type of excavation?

A. Hoe type of excavation.

Mr. Olson: Immaterial, incompetent, irrelevant, what is usual. What we're dealing with is the specifications call for a certain type of excavation.

The Court: I'll let him answer.

A. You ask me was it done with a hoe?

Q. Was it the usual type of hoe excavation?

A. Well, as I recall it, that's what they had down there, was a hoe excavation.

Q. And was it the usual type of hoe excavation?

A. Yes.

Mr. Holman: All right, that's all.

(Whereupon, there being no further questions, the witness was excused.)

MARVIN SEKTNAN

called as a witness on behalf of the defendants Macri, being first duly sworn, testified as follows:

Direct Examination

By Mr. Holman:

Q. Your name, please, is what?

A. Marvin Sektnan.

(Testimony of Marvin Sektnan.)

Q. Yes, Mr. Sektnan. And you are an engineer with the Bureau of Reclamation?

A. Yes, sir.

Q. And you are now in the operation and maintenance division, [306] are you not?

A. Yes, sir.

Q. You were a resident engineer, were you, on specification 1062 for the Bureau?

A. Yes, sir, part of the time.

Q. And when did you take over there? Do you recall, about?

A. About the middle of November, 1944.

Q. And you held about when?

A. Until the completion of the job.

Q. I didn't hear you.

A. Until the completion of the job.

Q. Oh, yes; and during that time did you take over inspection of concrete for some period?

A. Yes, sir.

Q. When was that, about?

A. February, about the 8th or 9th.

Q. And then you continued inspection until the end of the job? A. Yes, sir.

Q. I should say inspection of concrete.

A. Yes, sir.

Q. The excavations were not checked in the field, were they, Mr. Sektnan? A. No, sir.

Q. Did you check identification 13 your reports as [307] submitted by you, signed by you?

A. Yes, sir; they're included in that group. I didn't separate those you had listed, but they're



(Testimony of Marvin Sektnan.)

all in that one package. I found the ones you had listed.

Q. Can you tell me whether or not, then, you did by a report for February 9, 1945—

Clerk: As I understand, he hasn't segregated the ones that are listed from the rest of them.

A. They are in numerical order and date, but they're not separated.

Q. Will you just check the dates, then? February 9th? A. 9th.

Q. February 14, 1945?

The Clerk: Just a minute; if I'm going to have to segregate this I'll have to take the dates too. A. Yes, sir.

Q. February 16? A. Yes, sir.

Q. February 17? A. Yes, sir.

Q. February 19? A. Yes, sir.

Q. February 28? A. Yes, sir.

Q. March 1, 1945? [308]

A. Yes, sir.

Q. March 2, 1945? A. Yes, sir.

Q. March 3?

A. Yes, sir; this one of March 2 is signed my name by one of the men working under me.

Q. Oh, then you can't testify to that as of your own knowledge? A. No, sir.

Q. I'll eliminate that one, your Honor; March 3 you said yes? A. Yes, sir.

Q. And March 30? A. Yes, sir.

(Testimony of Marvin Sektnan.)

Mr. Holman: Those are the ones, your Honor, that I have marked defendant's 13-o.

(Whereupon, Daily inspection reports (Sektnan) were marked defendant Macri's Exhibit No. 13-o for identification.)

Mr. Holman: That's all, your Honor.

The Court: Yes; proceed with the cross-examination.

Mr. Olson: May I just glance at a couple of these, your Honor, here, and I just don't know what is in here; I'll look at a couple of them, and then let him go, and if I find something later on, we can call the witness back. [309]

The Court: All right.

#### Cross-Examination

By Mr. Olson:

Q. Mr. Sektnan, I notice here on looking at your report for March 3, 1945, a notation, "Carpenters working on forms at stilling pool and preparing to move chute forms; did not move forms and Cohen did not have finishers to prepare sacks for spraying." Now, what do you mean there, "did not have finishers to prepare sacks for spraying"?

A. Well, finishing the concrete.

Q. That refers to concrete?

A. After the forms are stripped, yes, sir.

Q. That does not refer to any part of excavation, then?

A. No, sir.

(Testimony of Marvin Sektnan.)

Q. Did you notice on that stilling pool out there—or were you there during the carpenters' installation of forms?

A. At times, yes; most of the time.

Q. And did you observe the fine graders or excavators working in the hole at the same time the carpenters were working?

A. There was fine grading going on at the same time. I don't know whose men they were.

Q. But there was fine grading being done in this pool at the same time the carpenters were putting in their forms?      A. Yes, sir.

Q. Whether or not it was Macri's or Schaefer's men you don't know? [310]

A. I don't know.

Q. And that was right near the end of the job, wasn't it?

A. That was near the end of the job, yes.

Q. So right up to the end of the job the excavation or fine grading was being done right up to the carpenters?

Mr. Holman: I object to that question as argumentative and not supported by the evidence in the case; not proper cross-examination.

The Court: Overruled.

A. Yes, there was fine grading going on at the same time the forms were being set, at that time.

Mr. Olson. That's all.

(Testimony of Marvin Sektnan.)

Redirect Examination

By Mr. Holman:

Q. That is not unusual in structure excavation, is it?      A. No, I wouldn't say it was.

Mr. Holman: That's all.

The Court: Any further questions?

(Whereupon, there being no further questions, the witness was excused.)

The Court: Does that conclude your Reclamation Bureau witnesses?

Mr. Holman: That does, your Honor.

The Court: I don't know just what your plans are with reference to offer of these exhibits. It just occurs to me, however, if there is some objection made [311] when they offered, it might be advantageous to have the witnesses here, if it is something that could be met by their testimony.

Mr. Holman: May it please the Court, I have requested the clerk to make copies of these various ones. As soon as they are done then I'll make the offer.

Mr. Olson: Counsel can offer them with the right to substitute copies.

The Court: Yes, you can offer them with that understanding.

Mr. Holman: Well, I do offer these that have been covered by the witnesses and marked especially by the Clerk.

The Court: That is all I refer to.

Mr. Holman: As defendant Macri's exhibits.

The Court: Let's see, now, let's have the record straight on that.

The Clerk: Macri's 13-a to 13-o inclusive.

The Court: What you're offering, then, these daily reports, would be Macri's identifications 13-a to 13-o, inclusive, is that right?

Mr. Holman: That is correct.

The Court: Do you have objection?

Mr. Olson: Yes, your Honor, we object to their introduction on the ground that they're immaterial, [312] incompetent, irrelevant, not the best evidence; they simply constitute written reports made by field inspectors to the Bureau of Reclamation, neither of whom are parties to this contract, and they have no evidentiary value as far as proving what was done and what the situation was on the project as it progressed.

The Court: The objection will be overruled and the identifications admitted, with the understanding that when copies are prepared by the Clerk they will be substituted for the originals, and the originals withdrawn.

Mr. Holman: Would that be originals withdrawn, or returned?

The Court: They may be returned to the Bureau of Reclamation.

(Whereupon, defendant Macri's Exhibits No. 13-a to 13-o, inclusive, for identification, were admitted in evidence.) [313]

M. C. SCHAEFER

the plaintiff, a witness in his own behalf, resumed the stand and testified further as follows:

Direct Examination  
(Continued)

By Mr. Olson:

Q. Now, Mr. Schaefer, you had just finished as we adjourned at noon relating a conversation between you and Mr. Macri and others on June 15, 1944. Now, on that date did you observe whether or not there were any form panels at your yard ready for installation in excavations?

A. Yes, there were.

Q. Can you tell approximately how many?

A. Well, at that time there had been prepared enough forms for about 72 to 76 structures. [314]

Q. And were there at that time any finished excavations that were ready for the receiving and placing of those form panels?

A. There were not.

Q. Now, following this conversation on June 15, did you bring your carpenters back on the job for the purpose of installing structures?

Mr. Holman: May it please the Court, I object to counsel's practice of continually asking leading questions that can be answered by yes or no. I think this witness should tell what was done.

Mr. Olson: Well, it is a preliminary question.

The Court: Well, it is leading. I'll sustain the objection.



(Testimony of M. C. Schaefer.)

Q. All right; what did you do, then, next, Mr. Schaefer, with reference to 1062? I don't care what you did down on the job in Portland.

A. There was no excavation ready to receive forms——

Mr. Holman: I move that be stricken as not responsive. He's asked what he did.

The Court: Well, he's explaining. I'll overrule the objection.

A. (Continuing): ——until June 29. On June 29 I had our superintendent on that job go back with another man to get re-started on the job. [315]

Q. Now, just relate in a general way, Mr. Schaefer, what was the condition of the excavations that Mr. Macri furnished you from then on to the completion of the job?

A. Well, there was demand at that time by Macri Company that we get back on the job. Though the excavations were the same general type, they did have a few of the holes fine——

Mr. Hawkins: Just a moment. He said there was a demand by Macri and Company that they get back on the job. Was that by letter or oral conversation? A. That was by 'phone call.

Mr. Hawkins: From whom?

A. That was by Macri's superintendent, Ashley, at that time.

Mr. Hawkins: Ashley? A. That's right.

Mr. Hawkins: And when was that telephone call made?

A. Well, let's see, there was——there had been a call about the 22nd, I believe.

(Testimony of M. C. Schaefer.)

Q. (By Mr. Olson): Of June?

A. Of June.

The Court: Now, let's get back to the direct examination, and the witness will try to answer the questions, and when we get through with direct we'll have the cross-examination.

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, what did this 'phone conversation with Mr. Macri, what did they say?

A. That is as to Ashley's request?

Q. Yes, I should have said Mr. Ashley.

A. Well, Ashley informed me that they had a certain number of excavations ready, and for us to get back.

Q. All right.

A. And then on the 23rd of June, I'm quite sure it was that, Fred Waltie and I drove back to Sunnyside to check up on conditions, and there had been at that time a number of excavations, the fine grading still wasn't proper, so we didn't go back until June 29.

Q. All right; now I'll ask you again, then, Mr. Schaefer, to not take each one of these 550 structures, but what was the general type of excavation, including the finished grading, that was furnished you by Macri and Company from then on throughout the job?

(Testimony of M. C. Schaefer.)

A. There was still the same fault; there was very little improvement. The excavations were still vertical right on through the balance of the job; there wasn't enough clearance to get the whalers and she-bolts in; still had to do the excavating to place she-bolts or to place the whalers; we still had to do fine grading and some back filling and excavating and sub-wall trenches; we still placed the first pipe into the structure, which wasn't [317] part of our work; I believe we still did some cribbing for them.

Q. Well, now, as this thing progressed, then, did you later retain counsel? A. Yes.

Q. And who did you retain?

Mr. Holman: Just one minute. Ahead of that, your Honor, may I ask a question for the purpose of the record?

The Court: All right.

Mr. Holman: Did you send written notice within five days after discovering this in June?

Mr. Olson: I object to that as being improper of counsel to take that up at this time. He can go into that.

The Court: I think we had better reserve that for cross-examination.

Mr. Olson: I may have all that covered by the time he gets to it anyhow.

(Testimony of M. C. Schaefer.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, who did you retain?

A. Mr. McKelvey, of Skeel, McKelvey, Henke, Evanson, and Uhlman, of Seattle, I believe that's the full firm name.

Q. Now, do you remember about when it was that you first retained that firm?

A. I believe that was the last part of October.

Q. And thereafter? [318]

The Court: That's 1945, I presume?

Q. What year was that?

A. That was 1944.

Q. That is during the progress of the job. Now, at that time had Mr. Macri retained counsel, or was he represented by counsel, if you know?

A. Yes.

Q. And who was that? A. Mr. Holman.

Q. (By Mr. Olson): Now, counsel, do you have a letter dated November 13, 1944?

M. Holman: I have the letters you demanded, Mr. Olson, except the one letter that I told you about.

Mr. Olson: Well, this letter of November 13, 1944 I think you have, written by Concrete Construction Company to Macri Company.

Mr. Holman: It is what date?

Mr. Olson: November 13, 1944.

(Testimony of M. C. Schaefer.)

Mr. Holman: Yes, sir, sent registered mail.

(Whereupon, letter Schaefer to Macri dated November 13, 1944, was marked Plaintiff's Exhibit No. 27 for identification.)

Direct Examination  
(Continued)

By Mr. Olson:

Q. Mr. Schaefer, showing you plaintiff's identification 27, I'll ask you if that is the original of a letter sent by [319] registered mail to Macri and Company, together with the envelope in which it was mailed?           A. It is.

Mr. Olson: We offer this plaintiff's identification 27 in evidence.

Mr. Holman: I object to it as a self-serving document, your Honor, unless and until all of the correspondence surrounding this instrument is also offered to show a complete transaction upon correspondence.

Mr. Olson: Of course your Honor doesn't know what's in it.

Mr. Hawkins: I further object on the ground it hasn't been submitted to me for examination.

Mr. Olson: That a good objection, counsel. I beg your pardon. Do you have the December 1 letter now?

Mr. Holman: Yes, sir.

Mr. Olson: Do you have the exhibit that was attached?

(Testimony of M. C. Schaefer.)

Mr. Holman: There was none attached that I know of. If you will show me the exhibit I can tell you whether I had it or not. What exhibit is attached?

Mr. Olson: Maybe it wasn't in there. Would you mark this for identification, please?

(Whereupon, letter Olson to Macri dated December 1, 1945, was marked plaintiff's Exhibit No. 28 for identification.) [320]

Q. Now, Mr. Schaefer, showing you plaintiff's identification 28, will you state whether or not that is a letter written by myself on your behalf to Macri and Company, at your request? A. It is.

The Court: What is the date of that one?

Mr. Olson: December 1, 1945.

Mr. Holman: 1945?

Mr. Olson: Yes. I assume that counsel for Macri and Company will admit receipt of this letter, I having gotten it from you.

Mr. Holman: Well, this is a letter to Macri and Company.

Mr. Olson: You admit that Macri and Company received that letter, do you not?

Mr. Holman: Oh, certainly, anything I produce I received.

Mr. Olson: Obviously Mr. Schaefer can't testify he sent it. I can take the stand and testify I mailed it, I assume.



(Testimony of M. C. Schaefer.)

The Court: He said he received it. It is time for mid-afternoon recess. You can look over those exhibits while you have time.

(Short recess)

(All parties present as before, and the trial was [321] resumed.)

Mr. Olson: Plaintiff Schaefer offers in evidence plaintiff's identification 27.

The Court: I think that was offered before and objected to by Mr. Holman.

Mr. Hawkins: We also object to it, your Honor, for the reason it is purely self-serving on the part of the Concrete Construction Company, and it is not binding on the defendants Goerig and Philp, not addressed to them, there is no testimony it was ever brought to their knowledge or attention, and furthermore, counsel advises me, according to his previous objection, that this is just one letter of a series of letters that transpired, and all of the correspondence should be offered.

The Court: Objection will be overruled. It will be admitted.

(Whereupon, Plaintiff's Exhibit No. 27 for identification was admitted in evidence.)

Mr. Olson: Plaintiff now offers in evidence plaintiff's identification number 28.

Mr. Holman: The same objection, your Honor.

Mr. Hawkins: The same objection, your Honor. It certainly cannot be binding on defendants Goerig and Philp, not addressed to them.

(Testimony of M. C. Schaefer.)

The Court: Well, of course, if a document is [322] admissible as to any defendant or any party, I have to admit it here, and then decide the effect of it afterwards. This last was after the completion of the contract?

Mr. Olson: Yes, your Honor.

The Court: What is your purpose in making this offer?

Mr. Olson: Showing our demand for payment.

The Court: Well, I'll overrule the objection and admit it for that purpose.

Mr. Olson: There is some reference in there to arbitration, which is wholly immaterial in view of the waiver.

(Whereupon, Plaintiff's Exhibit No. 28 for identification was admitted in evidence.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Schaefer, you have spoken about the lumber. Did you yourself take a sample of the form lumber that was furnished you on this job?

A. I did.

Q. And do you have that here in Court?

A. Yes.

Q. Both of these packages?

A. That's right.

Mr. Olson: We'll have to unwrap this, I assume, [323] unless you've got something there with a string on it.

(Testimony of M. C. Schaefer.)

The Court: It will have to be unwrapped at some stage if it is to be of any benefit to the trial Court.

Mr. Olson: I was wondering if I might ask my witness off the record if there is any reason why this can't go in together.

Witness: Yes, it can go in together.

(Whereupon, seven pieces of lumber were marked Plaintiff's Exhibit No. 29 for identification.)

The Court: There hasn't been any showing as to where this was procured, or the time.

Mr. Olson: No, there hasn't. I can do that now.

### Direct Examination

(Continued)

By Mr. Olson:

Q. When did you get this lumber, Mr. Schaefer?

A. That was on September 22.

Q. And where did you take it from?

A. At the yard, at the job.

Mr. Hawkins: That was in 1944?

Q. That's correct. Showing you plaintiff's identification 29, Mr. Schaefer, I'll ask you if this is the lumber to which you have——

Mr. Holman: Just one number, for the purpose of the record?

The Court: That's identification 29. [324]

Mr. Olson: Consisting of seven pieces of lumber.

(Testimony of M. C. Schaefer.)

Mr. Holman: Your Honor, may the clerk mark each piece of that lumber, so that there is no question what he is talking about?

The Court: What is your reason for wanting it marked separately?

Mr. Holman. Because there's seven distinct pieces of lumber, and without distinction, I don't know how we're going to get it to show in the record. If the exhibit number could be on each piece—I'll withdraw that, your Honor.

The Court: Well, it can be kept together, the same as your inspection sheets. They are all numbered the same number. We can keep it tied together. I think there will be no difficulty about that.

Direct Examination

(Continued)

By Mr. Olson:

Q. Well, then, referring to plaintiff's identification number 29, Mr. Schaefer, is this the lumber which you have just described as having obtained on September 22, I think you said, 1944?

A. It is.

Q. And who furnished this lumber on the job?

A. Macri Company.

Q. Now, just explain to the Court what this particular lumber or specification of lumber is; in other words, did you [325] pick up the worst lumber you could find down there, or what does it represent?

(Testimony of M. C. Schaefer.)

Mr. Holman: Just a minute, your Honor, I object to that as a self-serving statement. He's produced this, and that is what will go into evidence. We were not there to help make the selection.

The Court: I'll sustain the objection as to the form. You can ask him how he selected it.

Q. How did you select this lumber, Mr. Schaefer?

A. Well, I wouldn't just say that I backed up to it to pick it up, but I have pictures that will identify it.

The Court: Just answer the question.

Q. How did you pick it, Mr. Schaefer? In other words, what I'm getting at is are you telling the Court all of this lumber was of this particular type?

A. No, I'm not saying that. There is lumber that is of the worst that was delivered to the job, and at that late a date in the performance of the work; instead of just having the "pond dry" so to say, lumber, as we had it from the start and through quite a bit of the job, it got down to this point. Now, there is just about as bad as anybody could hope to see anywhere.

Mr. Holman: I move that he be stricken as volunteered, and not responsive to the question.

The Court: Yes, that can be stricken. [326]

Mr. Holman: It is pure salesmanship.

Mr. Olson: Poor salesmanship?

Mr. Holman: Pure.

Mr. Olson: That's what was confusing me.

(Testimony of M. C. Schaefer.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Schaefer, had this lumber—I notice some concrete, or perhaps I had better ask you what are these?

A. That is concrete. That there lumber with the notches and the concrete on it had been used on construction before, and I'm quite sure that some of the other lumber there had been used on construction, that doesn't show concrete on it.

Q. Now, what I'm trying to get at, was this taken after you had used it? A. No.

Q. Or is this lumber taken as it was delivered to you on the job?

A. That is lumber as was delivered on the job.

Q. And how large a quantity of this type of lumber was delivered to you there?

A. Well, on that I couldn't state. I believe that there was five thousand feet in that load.

Q. Well, you say "in that load." Tell the Court what you mean.

A. Whether it was delivered in one load or two loads I wouldn't [327] be able to say that, but I believe there was about five thousand feet delivered.

Q. Well, is this lumber representative of that particular delivery, whether it was one load or two loads? A. I'd say yes.

Q. We offer this in evidence, if the Court please, plaintiff's identification 29.



(Testimony of M. C. Schaefer.)

Mr. Holman: We would like the privilege of cross-examining the witness before it is acted upon, your Honor.

The Court: All right.

Mr. Olson: Can they do that right now?

The Court: If you want to ask him on voir dire, go ahead.

Mr. Holman: Well, I like to inspect the boards awhile, and something else—I don't know.

The Court: Well, I think he's entitled to make the offers of his exhibits as he goes along. If you're not able to make the objection you may inquire.

Mr. Holman: I object to the introduction at this time as not having been submitted for the purpose of inspection, the opposing party being deprived of any opportunity to cross-examine.

The Court: I am now giving you the opportunity to cross-examine, and if you wish, to examine them and look at them. [328]

Mr. Holman: I mean with respect to where these came from, or when.

The Court: Didn't you make the statement that cross-examination was denied you?

Mr. Holman: Oh, no.

The Court: I understood you to say that. If you want to inspect them, look at them now. Will you read that?

(Whereupon, the reporter read Mr. Holman's last objection.) (Commencing at line 19, page 84 of this transcript.)

(Testimony of M. C. Schaefer.)

The Court: That's pretty plain English.

Mr. Holman: I mean cross-examine after inspection.

The Court: All right, if you want to inspect them, you can inspect them right now. Untie them for that purpose if you wish. Now, you may have the right to cross-examine, as I told you before, if you wish, on voir dire.

Voir Dire Examination

By Mr. Holman:

Q. Can you tell me who delivered those?

A. I didn't see the lumber delivered.

Mr. Holman: I move, then, that that portion of the witness' testimony with respect to the time of delivery be stricken as based upon hearsay. [329]

The Court: The motion will be denied.

Voir Dire Examination

(Continued)

By Mr. Holman:

Q. Can you tell me where they delivered?

A. That there lumber was delivered to the job site, that is, the office site, the yard cite, on job number 1, or on the job specification number 1062.

Q. Now, didn't you say they were delivered on September 22, 1944?

A. No, that was the date on which I snapped some pictures and picked up these.

Q. I'm not interested in your pictures; I'm talking about this lumber.

A. And I picked up these boards.

(Testimony of M. C. Schaefer.)

Q. Do you know when this was delivered?

A. No, I don't; I couldn't tell you the date on that.

Q. And was this piled, or was it lying, or in what condition was it when you secured it?

A. It was dumped off there and was lying criss-cross.

Q. Lying criss-cross where?

A. Near the saw, in the job yard.

Q. Well, Mr. Schaefer, was this stuff cut off from other lumber, is that it? Was this stuff that was cut off?

A. There are some of the pieces there that as I had stated before, that will match out, to make one board. There's one of those boards there now comprising three pieces; I'm [330] quite sure that I cut one of the boards in three.

Q. Oh, you cut them? A. Yes.

Q. For convenience in bringing them here?

A. That's right, for convenience in bringing them in the car.

Q. And how do you know that they were not used before on this job?

A. Well, I know they weren't.

Q. How do you know, please?

A. They would have been made up in a panel of some sort.

Q. Sir?

A. I say, they would have been made up in a panel of some sort.

(Testimony of M. C. Schaefer.)

Q. Yes; and were these boards ever shown to any representative of Macri and Company?

A. Macri and Company men on the job, or superintendent, had plenty of opportunity to see it right there.

Q. Would you answer my question, please? Were these boards that are in identification ever shown to any representative of Macri and Company?

A. No, I didn't take them, deliver them to them to see them. Chances are Mr. Macri himself saw these boards out there on the job.

Mr. Holman: I move that be stricken as volunteered, your Honor. [331]

The Court: It will be stricken, yes. Just answer the questions.

Voir Dire Examination

(Continued)

By Mr. Holman:

Q. Then so far as any submission of these to Macri and Company or his representative at any time before now, that has not been done, has it?

A. No.

Q. Yes. Was any writing identifying these boards written to Macri and Company?

Mr. Olson: That is objected to as being immaterial, if the Court please, whether he wrote Macri a letter about it.

The Court: I'll sustain the objection.

Mr. Holman: I think that is all, your Honor, on cross-examination.

(Testimony of M. C. Schaefer.)

Mr. Olson: We renew our offer, if the Court please.

The Court: The objection is shown of record, I think. Do you wish to add anything to your objection?

Mr. Holman: No, I think that is it, your Honor.

The Court: Admitted.

(Whereupon, Plaintiff's Exhibit No. 29 for identification was admitted in evidence.)

### Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Schaefer, I would like to ask you to explain by [332] comparison how you could have performed your form setting, your panel settings into the forms, if the excavation were made with a bank to a 1 to 1 slope, and a lateral clearance at the foot or foundation of the structure out a foot, and the sub-elevation to the proper grade, as compared to how you could perform your work in making these structures in excavations that were tight, as you have described, and not to a 1 to 1 slope, with reference to the performance of your sub-contract.

Mr. Hawkins: Your Honor, I object to that question as obviously leading.

Mr. Holman: I join, your Honor.

Mr. Olson: As being leading?

(Testimony of M. C. Schaefer.)

The Court: He simply asked for a explanation. It is overruled. I don't see that it suggests the answer. He might answer it any way.

A. Had the excavation work been done according to specifications we would have built some of our panels to greater length, which would have afforded us the opportunity to use the panels more readily on the continuous line of structures. We would have then hauled our panels from the yard to the field, assembled them, made up the structure form, poured our concrete, been able to assemble by just merely raising the panel, or taking it into the hole, just raising it in place, putting on the [333] strong-backs, and sliding through the she-bolts and tightening it up, and after the pour, to loosen these she-bolts and use a nail puller to pull the required number of nails, and just loosened the panels away from the concrete, sliding them out of the hole, and having the truck take these panels on to structures ahead. Now, then, if the following structure didn't require certain of these panels from the particular structure, the balance of the panels would have been delivered on to the next hole. As it was we had to take all these panels back to the yard.

Q. Why?

A. Because of the damage done to the forms.

Q. What caused the damage?

A. Further, we would not have been required, or we would have organized our crew so—as an example, had one crew of two men, we'll say, placing forms in single structure holes, two crews, that



(Testimony of M. C. Schaefer.)

was our purpose, two crews designed to set forms in the double structure holes, and one crew to work on triples, then if there were more singles and triples than there were doubles, we would have taken one of the crews that were designed for setting doubles to help set the singles; or the better qualified crew, again the crew working on doubles, to help in setting triple structures, thereby the men would have been accustomed to the type of work, there would have been an [334] incentive, they wouldn't have been feeling dogged, and carpenters are a little different——

Q. Were you able to do that?

A. We were not.

Q. And why weren't you able to do that?

A. Because of the tight excavations.

Q. And how did the tight excavations prevent you from doing that?

A. Because of stripping of the forms; you couldn't get down in some cases to get the she-bolts out. There's some occasion there—there was one particular case, not that I did see but I was told of——

Q. Well, you can't relate what you were told of, Mr. Schaefer. What I want to know is just how your work was affected by what you term a tight excavation, without the 1 to 1.

A. All right; in the stripping of the forms they had to pry the form loose at the top and wedge it apart with two by fours, and in pulling them out of the hole there's just a lot of prying, and you

(Testimony of M. C. Schaefer.)

had to be careful so as not to wreck the concrete in the structure; then after stripping them out of the hole they were damaged to the extent where you couldn't have a field crew just follow along and do the small amount of check-up and see that there were enough of the panels at the holes for the setters as [325] they came along to set their structure, and if there was a board loose, or a minor bit of repair, those fellows would have done it. In this case, however, the forms were damaged to the extent that we had to send them on back to the yard and take care of the repair, and then send them all the way back out to the field, to the next structure ahead.

Q. Now, you also testified that there was not excavations ahead ready for your carpenters to install forms. How did that affect you?

Mr. Holman: Your Honor, I object to that as a leading form of question.

Mr. Olson: I haven't asked the question.

The Court: Well, the Court will remember, or try to, what the testimony is. Go ahead and ask your question.

Q. How did that, Mr. Schaefer, affect your orderly operations there, if at all?

A. Well, it just disrupted the whole works.

Q. Well, now, that doesn't mean too much to the Court, unless you explain how it disrupted it, in what particular, and why.

A. Well, when you put the carpenter into a hole and hand him a shovel, he's got to do a certain

(Testimony of M. C. Schaefer.)

amount of shovel work, and instead of going to the hole and knowing that it is correct, and starting right off by picking up his [336] form panel and start assembling his panels, he was required to check first off and see whether the sub-grades were at a proper elevation, whether he had room enough to get the forms in, and not finding it in that condition, they had to go to structures ahead, and check again, and then in not finding any that was right, they was probably sent back to the yard to tinker around.

Q. Now, explain what, if any effect, the manner of the excavations not being ready, the carpenters having to excavate, affected your pouring of concrete of your concrete pouring crew?

A. Well, instead of having the forms ahead so that we could proceed with the pouring of concrete, and run an average there of twenty yards per day or more, they were just stalled, and the concrete crew had to help strip, and just do about anything around the job in order to keep occupied.

Q. Did you have mobile concrete pouring equipment on the job?           A. Yes.

Q. And what equipment did you have?

A. I had a Mixomobile, a Buggymobile, we had a water wagon, and I believe, well, there was two dump trucks, and at times three dump trucks, to haul the aggregate.

Q. How about this Buggymobile, was that new, or old, or used, [337] or what?

A. No, we bought that I believe about the time we started that job.

(Testimony of M. C. Schaefer.)

Q. And how expensive a piece of equipment is that?

A. A Buggymobile I believe was \$1500.00.

Q. Now, this other concrete mixer that you spoke of, what type of piece of equipment is that?

A. That's a Mixomobile; it's a two-yard mixer.

Q. How expensive a piece of equipment is that?

A. What's that?

Q. How expensive a piece of equipment is that?

A. That I believe was \$7000.00.

Q. How much? A. \$7000.00.

Q. \$7000.00; and was that new, or old, or approximately what condition was it in?

A. That was in good condition; that had just been purchased.

Q. That had just been purchased?

A. Yes, that was purchased for this job, and then when we got on to job number 2 I was going to bring up the other Mixomobile that we did have.

Q. Now, were you able to keep that equipment busy and in operation throughout your concrete pouring operations on this job?

A. We were not. [338]

Q. Why?

A. Because there wasn't any concrete to be poured.

Q. Why wasn't there?

A. Because of the forms not being ready.

Q. And why weren't the forms ready?

A. Because the excavations wasn't ready.

(Testimony of M. C. Schaefer.)

Q. Mr. Schaefer, getting down to job 1068, did you or did you not perform 1068?

A. We did not.

Q. Did you receive a letter from Macri and Company directing you to proceed with 1068?

A. I did.

(Whereupon, letter Macri to Schaefer dated November 30, 1944, was marked Plaintiff's Exhibit No. 30 for identification.)

(Whereupon, letter Macri to Schaefer dated January 3, 1945, was marked Plaintiff's Exhibit No. 31 for identification.)

Q. Showing you plaintiff's identification 30, Mr. Schaefer, did you receive that letter?

A. I did.

Q. And showing you plaintiff's identification 31, you also received that letter?

Mr. Holman: What is 31?

Mr. Olson: 31 is your letter of January 3, 1945.

A. I did.

Q. Mr. Schaefer, when you received the letter dated November 30, 1944, being plaintiff's identification 30, the substance of which was to proceed with 1068, what, if anything, did you do with reference to that letter?

A. I called my superintendent.

Q. You called your superintendent?

A. Pat Darcy.

Q. Now, you won't be able to relate a conversation between you. Did you yourself at that time

(Testimony of M. C. Schaefer.)

or some time subsequent go out on the job site of 1068 and make an inspection to see what the conditions were?      A. I did.

Q. And when did you go approximately?

A. December 16 or 17.

Q. Around December 16 or 17?

A. I believe that's it.

Q. At that time, Mr. Schaefer, what did you see on job 1068?

A. Well, I saw a few excavations, I believe, at that time.

Q. Would you describe them?

A. They were rough. There had been no fine grading.

Q. Were they completed so that—to a bank with a slope of 1 to 1?

A. They were just dug, just a hole in the ground, that was all there was. There was no fine grading at all. [340]

Q. Had there been any hand excavation done?

A. There had not.

Q. Were they then ready or completed so that the panels could be completed or installed in them?

A. No.

Mr. Olson: If counsel is through examining these, we offer in evidence plaintiff's identification 30.

Mr. Holman: No objection, your Honor.

Mr. Hawkins: No objection.

The Court: Admitted.

Mr. Olson: We also offer in evidence plaintiff's identification 31.



(Testimony of M. C. Schaefer.)

Mr. Holman: No objection.

Mr. Hawkins: No objection.

The Court: Admitted.

Mr. Olson: I haven't heard the bonding company say anything. I assume you have no objection, Mr. Ivy?

Mr. Ivy: I haven't seen them.

Mr. Olson: I thought you were given an opportunity to examine them.

Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Schaefer, did you again go out on the job site before receiving the letter of January 3, 1945, being plaintiff's identification 31, if you remember; I mean you personally? [341]

A. Before I received the letter of January 3?

Q. January 3, 1945, the letter which in effect says that you were in default.

A. I believe not.

Q. You did not?                      A. I believe not.

Mr. Olson: We renew our offer, your Honor. I understand the bonding company has no objection.

The Court: They will be admitted, both 30 and 31.

(Whereupon, Plaintiff's Exhibit No. 30 for identification was admitted in evidence.)

(Whereupon, Plaintiff's Exhibit No. 31 for identification was admitted in evidence.)

(Testimony of M. C. Schaefer.)

Direct Examination

(Continued)

By Mr. Olson:

Q. After you received the letter of January 3, 1945, being plaintiff's Exhibit 31, did you go at that date or some date subsequent, go out and inspect the conditions on the site at job 1068?

A. I again called my superintendent on the job.

Q. And did you then later——

A. That's immediately on receiving that letter.

Q. You called your superintendent?

A. And then after that, on January 21, I went over to the job number 2, or 1068.

Q. And what did you observe then with reference to excavations? [342]

A. I saw excavations there, and——

Q. Well, describe the excavations that you saw.

A. There were no excavations ready to receive our forms.

Q. Were there any excavations—excuse me.

A. I wouldn't say, I don't believe there was any hand excavating done at that time.

Mr. Holman: I move that be stricken as the witness' belief, your Honor.

Mr. Olson: He's giving his best recollection.

The Court: Well, I'll grant the motion to strike. He doesn't seem to know one way or the other. What is this date?

Mr. Olson: January 21, 1945.

Mr. Holman: 22nd, I thought.

(Testimony of M. C. Schaefer.)

Mr. Olson: What was it?

Witness: January 21.

Q. Can you say, Mr. Schaefer, whether or not there were any excavations upon which hand excavation had been performed on the floor of the excavation on that date? If you can't say, why, don't. If you can, why, I want you to.

A. I don't think so.

Mr. Holman: I again move that be stricken, your Honor.

Q. Mr. Schaefer, without taking the time now, do you have [343] any memorandum from which you could refresh your recollection on that?

A. I have.

Q. Well, undoubtedly you're going to be on cross-examination tomorrow. Prior to tomorrow will you examine and see if you have some memo which you made at the time which will refresh your recollection on that point? A. I will.

The Court: And the answer will be stricken in the meantime.

Q. Mr. Schaefer, will you describe the banks of the excavations as you examined them on January 21, with particular reference to the slope, if any?

A. Well, there had been no slope.

Q. And what was the—I don't know what you call it—the condition or the angle from the bottom of the surface of the ground of the banks. Did you answer, Mr. Schaefer? A. No, I didn't.

Q. Do you understand me, Mr. Schaefer?

(Testimony of M. C. Schaefer.)

The Court: Do you understand the question?

A. If there had been no hand excavation?

Q. No, I'm asking about the bank. You say there was no slope. Now, I'm asking you what was the condition of the bank with reference to slope; you say no slope; maybe that answers it. [344]

A. No, there was no slope. It didn't provide for any slope.

Q. You mean there was no slope either way?

Mr. Hawkins: Just a minute; your Honor, I submit the witness has answered the question.

The Court: I think "no slope" would mean vertical in this case.

Mr. Hawkins: Either vertical or horizontal.

Witness: Here's the point there. If it was that there had been some hand excavating, then the banks were vertical. If it was that there had been no hand excavating, some of those holes were ditched out like that to a point, so to say, at the bottom, the outside edge of the hole, after being dug down from that point, would have formed vertical banks. That's the point.

Q. I see.

A. Why I was a little bit stuck in giving you an answer.

Q. Did you go out and inspect the job again, Mr. Schaefer, after January 21?

A. After January 21, January 23 we had a meeting at Seattle in Holman's office on being out on the job again on the 9th of February.

(Testimony of M. C. Schaefer.)

Q. Of what year?           A. 1945.

Mr. Holman: That, your Honor, is objected to as immaterial, irrelevant, and outside of the issue, except [345] for the purpose of the witness describing conditions unchanged, if they were, on and after January 3, 1945. In other words, may it please the Court, the principal contractor has given formal notice of termination as of January 3, 1945, by Exhibit 31.

The Court: Are we still talking about 1068, now?

Mr. Holman: Yes, sir, on 1068. In other words, that is subsequent to the termination, if there was a termination.

Mr. Olson: Subsequent to your writing the letter.

The Court: Well, I think it might have a bearing on what the condition was previously. I'll overrule the objection.

Witness: All right; on February 9 we went over, that is, Mr. McKelvey, Mr. Kelly of Mr. McKelvey's office, Mr. Hewitt of Yakima, Pat Darcy—

Q. Who is Mr. Hewitt of Yakima?

A. He's an engineer; Pat Darcy, our superintendent, went over to 1068 and inspected some of the excavations.

Q. And how were the excavations done?

A. And the excavations at that time were the same general type as used on 1062. Those that had been—those that fine graders had worked in had

(Testimony of M. C. Schaefer.)

vertical banks; some of the other excavated holes had the slope, just a rough hole, so that the outside edge of the hole would, from [346] perhaps to the width or dimension of the structure, and allowing from there on down to produce a vertical bank, the same general type that had been used on those that were fine graded.

Q. Now, getting back just for a moment to this previous date of January 21, 1945. On that date, had Macri and Company done anything with reference to forms, making panels?

Mr. Holman: Objected to as outside the issues, your Honor.

The Court: Overruled.

Witness: January 21 they had some platforms built at the yard, and they had some simple, had, say, simple structures constructed on these platforms. I believe we did check as to how many panels they had built at that time. I'd have to look at the record.

Q. First, did Mr. Hewitt at your request take measurements on the excavations that had been made by Macri and Company on 1062?

A. He did.

(Whereupon, letter to Macri dated February 13, 1945, was marked Plaintiff's Exhibit No. 32 for identification.)

Q. Mr. Schaefer, do you know whether or not Mr. McKelvey or his office upon their return to Seattle after being on the job on February 9 as you



(Testimony of M. C. Schaefer.)

have just described, wrote [347] the Macri Construction Company a letter specifically referring to 1062 and 1068, a copy of which is handed you as plaintiff's identification 32?

Mr. Holman: Your Honor, I object to the question of writing; if he's talking about sent, that's what he means, I think, don't you?

Mr. Olson: I think I would have to show that it was not only written, but sent; if it was any letter that we wrote it was sent out.

Q. If you know?

A. Well, I believe they did; I don't know.

Mr. Holman: I move that be stricken.

Mr. Olson: I have served upon counsel a notice to produce the original, and as I understand, counsel is unable to find the original, and believes it was never received.

Mr. Holman: I believe more than that. I believe that was not a copy of the letter, unless somebody has copied a letter that Mr. McKelvey's firm sent, since it bears no indication of any dictation or transcription usual to their office. I have a number of their letters, and it bears no signature of the firm, and its contents are entirely strange to us, and the demand made upon us did not identify the writer of the letter, so that we have never seen it.

Mr. Olson: I think you're correct, this is not a carbon copy, but a copy my office made off the carbon copy.

(Testimony of M. C. Schaefer.)

Direct Examination

(Continued)

By Mr. Olson:

Q. You're unable to say, Mr. Schaefer, whether or not the original of this letter was ever mailed?

A. I couldn't say.

Mr. Olson: If your Honor please, in order not to disrupt the order of identifications, may I withdraw this? I'm perfectly willing to leave it here, but I can readily see it is useless for me to offer it, so if it won't disrupt the numbering system I'll withdraw it. I take it you're not willing for it to go in?

Mr. Holman: No, I'll never agree to that.

Mr. Olson: You may cross-examine.

The Court: We can have Mr. Holman cross-examine first, and then Mr. Hawkins, and then Mr. Ivy. Would that be acceptable to counsel, in that order?

Mr. Holman: That will, your Honor.

Cross-Examination

By Mr. Holman:

Q. Mr. Schaefer, will you produce, please, the letter you say you received from Mr. Staples, Mr. Macri's superintendent, before you went on to 1062? Do you have it handy, Mr. Schaefer? If you have, all right; otherwise you can produce it in the morning. [349]

(Testimony of M. C. Schaefer.)

Mr. Olson: I might say that is not included in the notice to produce, and if it will expedite any, we can get it out in the morning, or now.

Mr. Holman: I don't want to take the time for search.

The Court: He has it there, I think.

Q. Very well. Maybe you won't have to take it apart, if you'll just let me see it. Now, you received an undated letter, mailed February 29, 1944, from Yakima, addressed to Mr. Matt Schaefer, the Concrete Construction Company, Portland, Oregon, signed by George M. Staples, superintendent, on Macri and Company's stationery, showing 209 South 4th Street, Yakima, Washington; the letter you have before you? A. Yes.

Q. Is that the letter that you testified about on direct examination? A. It is.

Q. And were these endorsements which are on the side in pencil on it when you received it, or not? A. They were not.

Q. In other words, those are some of your office notations? A. They were.

Q. And was the longhand writing on the bottom, the "P.S." on it at the time? [350]

A. It was.

Q. Is there any objection to pulling this out of the file? A. O.K.

Q. Pardon me, was the figure 1 on there at the time? A. It was not.

Q. In other words, that's some of yours?

A. That is the numbering.

(Testimony of M. C. Schaefer.)

Q. First letter on the job; first letter you got?

A. That's right.

Mr. Olson: I might suggest if the bonding company is interested in this they can look at it at the same time.

Mr. Ivy: Is that on 1068?

Mr. Holman: No, on 1062, Mr. Ivy.

Cross-Examination

(Continued)

By Mr. Holman:

Q. Will you—— A. Just pull it out.

Q. Yes. The other paper attached is the answer?

A. That's right.

Mr. Holman: May I have this marked for identification, your Honor, consisting of two sheets of paper and an envelope?

(Whereupon, letter to Matt Schaefer and reply dated March 2, 1944, was marked Defendant Macri's Exhibit No. 33 for identification.) [351]

Q. Handing you Macri's identification 33, the pencil memo which is on the letter, on Macri and Company's stationery, is matter that you had put on after you had received the letter?

A. That's correct.

Q. Is there any objection to obliterating that now? A. No, sir.

Q. Let's do that.

The Court: Why not let the clerk erase it? Is it in pencil?

(Testimony of M. C. Schaefer.)

Q. Very well. Now, was that the first communication of any kind you had with respect to 1062, in issue in this case?

A. That is correct, yes.

Q. And that was not preceded by any telephone or any other arrangements? A. No.

Q. And the answer which is shown on the upper page of this exhibit—identification, I believe it is, 33, dated March 2, 1944, was written under your direction, or at least a communication from your office, an authorized communication?

A. Well, I would have to be refreshed on that, as to whether I had——

Q. Well, is it a Schaefer communication that was authorized by your office, or not, Mr. Schaefer?

A. It went from our office. Whether I was asked about it before it went out, I'm not positive, unless I'd read the letter.

Q. Who is Ben McCue, that signed that?

A. Ben McCue had been a truck driver, and he had certain bookkeeping and office experience, and I had him in the office there while I was on the sick list.

Q. Then will you answer me, please, whether or not that was a letter authorized to go from your office at that time, or not? A. Yes.

Q. Very well. And this number 246 which is on here——

Clerk: I put that on, Mr. Holman. That's the case number.

(Testimony of M. C. Schaefer.)

Q. Then you later signed the contracts, did you not, the contract which is in evidence as the sub-contract on specification 1062? A. I did.

Q. Plaintiff's Exhibit 5. Was there any intermediate correspondence between this communication which is marked plaintiff's 33 and the signing of the contract between you and Macri?

A. There were 'phone calls.

Q. I asked you about correspondence, sir.

A. No. [353]

Q. Then at the time of signing the contract, or shortly thereafter, did you secure from the Glen Falls Indemnity Company a bond to Macri and Company? A. I did.

Mr. Holman: Will you mark that for identification, please?

(Whereupon, Bond delivered to Macri on Specification 1062 was marked Defendant Macri's Exhibit No. 34 for identification.)

Q. Handing you Macri's identification 34, is that the bond that you delivered to Mr. Macri with the contract, or after the contract was signed?

A. As to whether the bonding company forwarded that or whether I did, I wouldn't—

Q. Will you read the question, Mr. Reporter?

(Whereupon, the reporter read the last previous question.)

Witness: Yes.

Q. Did you secure this identification 34 and send it, or did the surety send it, if you know?



(Testimony of M. C. Schaefer.)

A. I wouldn't be able to say.

Q. Now, did you know that identification 34 bore the execution of the surety, but not your signature as principal? Look at it.

The Court: Is this on 1068 or 1062? [354]

Mr. Holman: 1062, your Honor.

Witness: I didn't know that.

Q. And did you ever call attention to Mr. Macri that you had submitted a bond without your signature?

Mr. Olson: If your Honor please, it's our bond; there's nobody suing on our bond on this job, so the fact may be a blank bond was submitted, nobody's suing us on it. This is wholly irrelevant. There is no contention by Macri and Company that we did not perform. I don't see the purpose gained by it.

The Court: I don't see the materiality of it. Of course, there's been nothing offered before the Court.

Mr. Holman: I now offer, your Honor, as part of the transaction for the execution of Plaintiff's Exhibit 5, the identification which is marked as Macri's 34, together with Macri's 33, the only correspondence preceding the transaction.

The Court: Well, let's take them up in order. First number 33, Mr. Olson.

Mr. Olson: I have no objection.

The Court: Defendant Macri's identification 33 will be admitted.

(Testimony of M. C. Schaefer.)

Mr. Hawkins: We would like to make a formal objection for the record that none of these letters were addressed to Goerig and Philp nor called to their attention, [355] are immaterial as far as they are concerned, and should not be admitted.

The Court: Do you have any objection, Mr. Ivy?

Mr. Ivy: No, I do not, your Honor.

The Court: Identification 33 will be admitted.

(Whereupon, Defendant Macri's Exhibit No. 33 for identification was admitted in evidence.)

The Court: Now, defendant's identification 34. Have you offered that?

Mr. Holman: I was just letting counsel examine it.

Mr. Hawkins: We have no objection.

Mr. Olson: I object, your Honor, to the introduction of identification 34. It can have no possible bearing on this case, wholly immaterial.

Mr. Holman: The other half of the transaction under Exhibit 5 requires that the plaintiff shall furnish a bond, and 34 has been identified by the witness as the bond he furnished, and it speaks for itself.

Mr. Olson: There is nothing in the pleadings whatsoever involving Mr. Schaefer's performance bond under his contract with Macri, no claim that he did not perform his sub-contract, the bonding company is not a party, not involved in any manner.

The Court: That's the performance bond?

Mr. Olson: Mr. Schaefer's. [356]

(Testimony of M. C. Schaefer.)

The Court: Is it your contention that he has no right to sue, because of his failure to furnish a bond? I don't get your purpose.

Mr. Holman: My purpose is to have the sub-contract supplemented by the bond called for, as furnished by Mr. Schaefer.

The Court: Well, I'll admit it for what it is worth. I don't see its materiality in the controversy here.

(Whereupon, Defendant Macri's Exhibit No. 34 for identification was admitted in evidence.)

The Court: It's time to adjourn so far as this case is concerned, but the Court has some other matters to take up. This case will be resumed at 10 o'clock tomorrow morning.

(Whereupon, the Court took a recess in this cause until Wednesday, February 26, 1947, at 10 o'clock A.M.)

Yakima, Washington, February 26, 1947.

(All parties present as before, and the trial was resumed.)

M. C. SCHAEFER

the plaintiff, a witness in his own behalf, resumed the stand and testified further as follows:

Cross-Examination

(Continued)

By Mr. Holman:

Mr. Holman: Counsel, I asked you to produce certain letters. May I have them now for identification?

(Testimony of M. C. Schaefer.)

(Whereupon, letter Macri to Schaefer dated November 30, 1944, was marked Defendant Macri's Exhibit 35 for identification.)

(Whereupon, letter Macri to Schaefer dated December 27, 1944, was marked Defendant Macri's Exhibit 36 for identification.)

(Whereupon, letter Bureau of Reclamation to Schaefer, dated January 25, 1945, was marked Defendant Macri's Exhibit 37 for identification.)

(Whereupon, letter Macri to Schaefer dated January 27, 1945, was marked Defendant Macri's Exhibit 38 for identification.)

Q. Mr. Schaefer, at the time of executing the sub-contract for performance of specification 1062, schedule 1, or at least before starting your work, you had access to and had read the specifications covering that job which are in evidence?

A. I have.

Q. And you had access to or had consulted what are known as the lay-out typical sections which are in evidence?

A. I did.

Q. At the time of the execution of that sub-contract had you purchased any of the equipment that you described yesterday, or did you purchase it after? You described, [358] if I remember, a Buggy-mobile and a Mixomobile.

A. I'm quite sure that both those pieces of equipment were purchased after.

(Testimony of M. C. Schaefer.)

Q. Now, with reference to any diary you have, or any information you have, will you please give me as near as you can the dates upon which you were on the work, 1062, prior to March 30, 1945? Do you have any record, Mr. Schaefer?

A. Yes.

Q. I want to know what days you were there, or at least the number of days.

A. Well, I was there about 25 times, or 25 days.

Q. Do you have them listed? If you have, Mr. Schaefer, if not——

A. On March 16 of '44, March 17, April 12, 27, 28, 29, May 2, 19, June 15, 23 and 24, September 21 and 22, October 20——

Q. Did you say 24 and 27?

A. 21 and 22; October 20, December, about 6 or 7——

Q. 6 or 7?

A. Yes, and about the 17th.

Q. About the 17th?

A. January 20 and 21, February 9, March 30 and 31.

Q. What are you consulting, Mr. Schaefer? Is that something you made up for the purpose of trial? [359]

A. This I took from the daily reports.

Q. Oh, yes, in other words, you made it up for the purpose of trial now? A. Yes.

Q. Mr. Schaefer, I hand you what have been marked Macri identifications 35 to 38 inclusive, and

(Testimony of M. C. Schaefer.)

will ask you if you received those letters in due course of mail, as indicated by those identifications? I just got them from your counsel.

The Court: He has identifications 35 to 38 now, is that the ones he's looking at, Macri's?

Mr. Holman: Yes, your Honor.

Mr. Olson: The only question they've asked you now, Mr. Schaefer, is did you receive those letters?

Witness: Yes.

Mr. Holman: I offer in evidence these identifications, your Honor. They had them in due course of mail, and I would like to read them to the Court if I may.

Mr. Olson: I have no objection to them being admitted as having been received by us.

The Court: They will be admitted.

(Whereupon, Defendant Macri's Exhibit No. 35 for identification was admitted in evidence.)

(Whereupon, Defendant Macri's Exhibit No. 36 for identification was admitted in evidence.)

(Whereupon, Defendant Macri's Exhibit No. 37 for identification was admitted in evidence.)

(Whereupon, Defendant Macri's Exhibit No. 38 for identification was admitted in evidence.)

Mr. Holman: Or would your Honor prefer to read them?

The Court: If you think they should be read now, you may read them.

Mr. Holman: Just for the purpose of co-ordination, your Honor.



The Court: Yes, I can keep the continuity better.

(Whereupon, Mr. Holman read Exhibit 35.)

Mr. Holman: Do you have that other letter?

Mr. Olson: It is in evidence. I was just going to remark, in order for it to be intelligent, they should be both considered together.

Clerk: Plaintiff's Exhibit 27.

Mr. Holman: May I hand it to the Court?

The Court: Yes. I've read it but I haven't in mind just what it is. I'll just look it over first, and then you can read the others. All right.

Mr. Holman: May I ask counsel to produce the letter of September 18, 1944, from the Bureau?

Mr. Olson: Well, that's addressed to you, Mr. Holman. [361]

Mr. Holman: Yes, but the copy that was sent to Schaefer.

Mr. Olson: I haven't got it. The original, as I understand your letter, was mailed by the Bureau of Reclamation to Macri and Company. They should produce the letter, rather than us.

Mr. Holman: Well, just a minute your Honor. May I pause to read this letter when I have it identified?

(Whereupon, Letter Bureau of Reclamation to Macri dated September 18, 1944, was marked Defendant Macri's Exhibit No. 39 for identification.)

Mr. Holman: Shall I proceed with these others, your Honor?

(Testimony of M. C. Schaefer.)

Mr. Olson: Were you going to read this, so that the Court will have it in his mind?

The Court: He'd have to offer it first.

Mr. Olson: If your Honor was going to have to read it in order to rule on it, I thought maybe I could listen to it the same time you were. Which-ever you want. I'll read it first, if you like. Mr. Schaefer, while I'm doing that, would you look to see if you have a copy of a letter from the Department of the Interior dated September 18, 1944?

The Court: What is the date of that letter?

Mr. Holman: September 18, 1944. [362]

Witness: Yes, I have.

Mr. Olson: Well, your Honor, if Mr. Schaefer says that he got a copy of it, I can read it later, then.

Mr. Holman: I offer it in evidence, then.

The Court: I assume that all these letters are offered for the purpose of showing contentions made by the parties and notice to the other party, and perhaps some admissions. I don't know, I haven't seen any yet, but they certainly wouldn't be competent evidence of the claims made in there as to whether these things have been done or haven't been. It is only evidence of notice to the other party of what their contentions are. The same thing will be true of the Bureau letter.

Mr. Olson: As we got a copy of it, I have no objection to it going in, on the basis that it was sent and we got a copy of it.

The Court: It is admitted.

(Whereupon, Defendant Macri's Exhibit No. 39 for identification was admitted in evidence.)

(Whereupon, Mr. Holman read Exhibit 39 to the Court.)

Mr. Holman: The next communication, your Honor, is Macri's Exhibit 36, addressed to Concrete Construction Company, on Macri stationery.

(Whereupon, Mr. Holman read Exhibit 36 to the [363] Court.)

Mr. Holman: The additional communication from the Bureau, your Honor, is defendant Macri's Exhibit 37. May it be understood that this doodling, or graphs, or whatever it is, in pencil may be disregarded?

Mr. Olson: Yes.

Mr. Holman: And by the way, counsel, on Exhibit 35 I notice somebody has written here "no sub-contract". Could that be stricken?

Mr. Olson: Yes.

Mr. Holman: May I have your Honor's permission to strike it?

Mr. Olson: I don't think the Court would pay any attention to it anyhow.

Mr. Holman: No, I know, but an exhibit is an exhibit.

(Whereupon, Mr. Holman read Exhibits 37 and 38 to the Court.)

#### Cross-Examination

(Continued)

By Mr. Holman:

Q. It is a fact, is it not, Mr. Schaefer, that you, as indicated by your times of attendance upon these jobs, did not act as superintendent of the jobs?

A. I did not.

(Testimony of M. C. Schaefer.)

Q. And at the time this work was going on, did you have other work going on elsewhere? [364]

A. I did.

Q. Where and what kind of jobs did you have going on?

A. Well, we had work going on around Portland.

Q. What kind of work, Mr. Schaefer, and where was it?

A. Well, there I'd be—it would be form work. I couldn't right now name specific jobs, perhaps?

Q. Why do you say perhaps?

A. Well, there is—we do work for perhaps 5 to 800, that is, have 5 to 800 jobs a year.

Q. Mr. Schaefer, what I'm asking you, what jobs you had in hand at that time, outside of these jobs 1062 and 1068. If you can't tell me, say so.

A. Well, I'd have to refresh my mind by our files on that.

Q. Do you have those here?

A. No, I don't.

Q. And can you make a schedule of those jobs, showing the amount of work involved and with whom they were? A. Yes.

Q. Will you do that, and furnish it? Will you contact your office and have that done so it can be available here?

A. I might have someone bring up the file of 1944.

Q. Well, I don't want to be captious on it, Mr. Schaefer, but I would like that information. I

(Testimony of M. C. Schaefer.)

would like to know the jobs you had, where they were, what they were. I'm talking about concrete construction jobs. [365]

Mr. Olson: May I ask the purpose of it? Just offhand I don't see the materiality. Perhaps there is something I don't see.

Mr. Holman: It is a matter of preliminary on cross-examination, your Honor.

The Court: Well, even though it is preliminary, if he's to furnish all this information it should be material.

Cross-Examination  
(Continued)

By Mr. Holman:

Q. Can you tell me approximately what jobs you had? In other words, you were not here; what were you doing?

A. I was tending to business back in Portland, so as to make enough money to keep this job going up here.

Mr. Holman: I move that last be stricken.

Mr. Olson: I object to that. He asked what he was doing.

The Court: Yes, I'll not strike it. However, Mr. Schaefer, I think it would be best if you refrain from the type of reply you have been making, and just answer seriously counsel's questions.

(Testimony of M. C. Schaefer.)

Cross-Examination

(Continued)

By Mr. Holman:

Q. Can you tell me approximately how many jobs you had, one, two, three, five, or whatever it was, while this work was going on?

A. In excess, I'll say, in excess of 200 jobs. [366]

Q. You had in excess of 200 jobs going on while this job was going on?

A. That's right.

Q. And I believe you referred to your brother as your general superintendent?

A. That is right.

Q. What was his name?

A. William E. Schaefer.

Q. And he was in charge of the over-all operations of all of the jobs, was he?

A. That is correct.

Q. Sir? A. That is correct.

Q. Now, was this equipment which was brought to 1062 brought from one of the other jobs, or had it been used on one of the other jobs, before it came here?

A. Yes.

Q. What type of work had the Mixomobile been used on?

A. Well, on—in other words, we were operating at that time we had two Mixomobiles, and they were both used on house basements, or a pumping station, for, let's say it is the job there on Sauvie's Island, for the Land Conservation Department, or something of that sort.

Q. In the Portland area?

A. Yes. [367]



(Testimony of M. C. Schaefer.)

Q. And in the Portland area there were paved streets and accessible roads for that to move around, correct? A. That is right.

Q. Now, when that Mixomobile arrived here, it had a 15 or 18 foot elevator on it, did it not?

A. Tower, yes.

Q. Tower, you call it? A. That's right.

Q. And that was for the purpose of lifting concrete to an elevation, say, of a second story building?

A. To the height of a one story building.

Q. Yes, sir, the height of one story, and the Mixomobile was set upon what type of truck?

A. Ford.

Q. Ford truck; and it had wheels and tires?

A. That's right.

Q. And it was not replaced with caterpillar treads when it was brought here?

A. It was not.

Q. And the Buggymobile, had that been used elsewhere, or did you buy that for this job?

A. Well, I bought both pieces of equipment for this job, but the Buggymobile had been used on other jobs, yes.

Q. A Buggymobile is a little short rig, isn't it, with a little bucket that can take it up and deliver it—it is [368] a fast moving thing?

A. Well, it is a three-wheeled rig with a hopper that the concrete is dumped from the mixed into the top of this hopper.

Q. Well, they're used in coal yards, gravel pits, and everywhere else for quick handling?

A. No, that's a Scoopmobile.

(Testimony of M. C. Schaefer.)

Q. What do you call this one?

A. This is a Buggymobile.

Q. And what sort of a truck did it have?

A. Truck?

Q. It just had a three-wheel chassis, is that it?

A. That's right.

Q. Now, did you have any—you had no revolving concrete mixers on the job, did you?

A. Well, now, I don't get what you mean; the drum——

Q. You had no transit mixer?

A. No, no transit mixer.

Q. And did you have any of those in Portland?

A. No.

Q. You have none of those in your equipment?

A. No.

The Court: I'm not sure that I know what a transit mixer is.

Mr. Holman: Your Honor, it is these trucks—  
[369] your Honor has unquestionably seen them.

The Court: With a mixer on the truck?

Mr. Holman: It is moving while they go along.

The Court: Yes, I know.

Cross-Examination

(Continued)

By Mr. Holman:

Q. What was the over-all weight of the Mixo-mobile, approximate, Mr. Schaefer?

A. About eleven ton.

(Testimony of M. C. Schaefer.)

Q. Eleven tons?

A. That's just—that is as close as I would be able to guess.

The Court: I didn't get the last.

A. That would be as close as I could guess it without checking back.

Q. You have a way of dropping your voice, and we don't get the end of the sentence. Of course, the Buggymobile was a very light rig, wasn't it?

A. Comparatively light, yes.

Q. What did it weigh?

A. That I wouldn't really be able to say.

Q. When you received this letter which is in evidence, from Mr. Staples, did you go on to 1062 location before you contacted Mr. Macri?

A. No, I contacted Mr. Macri before we went to the site.

Q. The first date you gave me was March 16, 1944. Had you [370] contacted Mr. Macri before that date?      A. Yes.

Q. And you had signed the contract, hadn't you?

A. Yes.

Q. Then is it or is it not a fact that you signed the contract before you were on the job?

A. Yes.

Q. In other words, you signed the contract without making an inspection of the job, correct?

A. Before we started work on the job; no, I was over the job site before we signed the contract.

(Testimony of M. C. Schaefer.)

Q. That's just what I asked you a minute ago, Mr. Schaefer, whether you were on the job before you contacted Mr. Macri.

A. No, I contacted Macri by 'phone.

Q. You telephoned Macri?

A. I telephoned Macri.

Q. All right.

A. And then we went up to see Mr. Macri after our telephone conversation.

Q. Where, Seattle or here?           A. Seattle.

Q. At Seattle; all right.

The Court: Is this before the contract was signed, now, he's talking about? [371]

A. That's right.

Q. I think so, yes. I'm trying to find out. All right, then what?

A. At that time we talked about lumber, and about roads, and those items about the batching, and from there we went over to Sunnyside and looked at the job site.

Q. When you say we, is that Macri and you?

A. That is brother Bill and myself.

Q. Brother Bill is your general superintendent?

A. That is right.

Q. You and your general superintendent went over on the work and saw the conditions there before you signed the contract, is that right?

A. We did.

Q. Then when you left that job did you go back to Portland? When you left the location of 1062 did you go back to Portland, or did you go back to Seattle?           A. We went back to Portland.

(Testimony of M. C. Schaefer.)

Q. And did you have the sub-contract with you? Did you sign it down there, or did you sign it in Seattle?

A. I again had a meeting with Mr. Macri.

Q. Mr. Schaefer, would you answer my question? Did you sign it in Seattle, or did you sign it in Portland, or somewhere else? Where did you sign it?

A. I believe we signed it at Seattle. [372]

Q. In Macri's office? A. Yes.

Q. Now, when you were over here with your brother Bill did you go to the Bureau office here in Yakima or at Sunnyside? A. I believe not.

Q. Yes, sir. Did you consult their drawings or their plans or their specifications at that time?

A. We consulted Mr. Macri's plans.

Q. The copies in the Macri office in Seattle?

A. Yes.

Q. All right; and what did you do toward going over the job itself? I have in mind now particularly with respect to the laterals. Did you walk out those laterals, you and Bill, your brother Bill?

A. No, we didn't walk down the laterals. We walked out over the general area there.

Q. Did you make any core tests for soil?

A. We did not.

Q. Did you make any shovel excavation for soil content? A. We did not.

Q. Did you inspect any other excavations of other subcontractors who were then at work?

A. We saw some of the other work, yes.

Q. What work did you see? [373]

(Testimony of M. C. Schaefer.)

Mr. Olson: That is objected to.

Mr. Holman: This is quite important.

Mr. Olson: I would like to make my objection. It is wholly immaterial what kind of excavation, if any, someone else was to make. The type of the soil is immaterial. In other words, under the subcontract Macri and Company was to make all the excavations. That part is clear, and I think that part there is no dispute on. Whether or not Mr. Schaefer looked to see what someone else was doing or what the soil conditions were I think is wholly immaterial.

Mr. Holman: At this time, I've been waiting for the place to arrive to call your Honor's attention to this matter of theoretical slope, and so that your Honor can get the full import of the position taken by the respective parties, if I may, your Honor.

The Court: Yes, all right.

Mr. Holman: In plaintiff's Exhibit 3, paragraph 47, your Honor, I have my own copy, and I would like to just read that portion to your Honor.

(Whereupon, Mr. Holman read paragraph 47 of plaintiff's Exhibit 3.)

Mr. Holman: I take it your Honor is thoroughly familiar with what is meant by neat lines?

The Court: Yes, the outside of the concrete. [374]

Mr. Holman: The next section is with respect to back fills, your Honor. Now, my question here, your Honor, is whether or not this witness inspected these specifications and inspected work then going



(Testimony of M. C. Schaefer.)

on in the field on this project. I think it is an entirely competent question, I submit.

Mr. Olson: It is my position, your Honor, that these specifications concerning 1062 are the controlling agreement between the parties as to the type of excavation that was to be made. In other words, supposing I was attempting to show your Honor that this other contractor, I don't know what the situation was, was excavating three feet out?

The Court: I don't think the purpose of his examination goes to that. It is whether the character of the soil was material, involving the difficulty of maintaining these slopes called for in the specifications. I understand it is conceded here that the principal contractor was to do the excavations. I can hardly see how whether it was difficult to do it under the circumstances was of any concern to the sub-contractor, who was to merely put in the structures. He was supposed to get the excavations according to the specifications, regardless of the difficulty to the contractor.

Mr. Holman: That's correct, your Honor, but the [375] 1 to 1 is an arbitrary pay, and not the actual slope according to those specifications.

The Court: Well, it is to be paid for, and it is to be proper in a manner for the setting of concrete. If your contention is that it is a proper procedure to make them vertical, or other than a 1 to 1, this might be material.

Mr. Holman: That is my position, your Honor. The specifications require as long as the contracting officer accepts the excavations——

(Testimony of M. C. Schaefer.)

The Court: That is some representative of the Bureau of Reclamation?

Mr. Holman: That's right.

The Court: Is it your position that an official of the Bureau of Reclamation modified this contract, and directed vertical walls, or a slope other than 1 to 1 on dirt?

Mr. Holman: No, my position is that the contracting official paid on computation, just as testified here. Your Honor will recall, I think it was Mr. Nuttley, I asked if he measured excavations, he said no, that was a matter of computation. In other words, they allowed upon the structures themselves, and the purpose of the neat line, your Honor, the 1 to 1 slope, is just as indicated by those specifications; the man can't go outside and [376] excavate a half acre and put in a six foot box, and get paid for anything except up to the neat line.

The Court: That's true as far as pay is concerned, but Schaefer isn't concerned with what was paid to the principal contractor, is he?

Mr. Holman: No, he was not.

The Court: The issue is whether the excavation was made up to specifications.

Mr. Holman: That's why I want to inquire what he saw in the field at that time.

The Court: Is it your position that general practice would govern over the contract clause?

Mr. Holman: Not at all.

The Court: Well, why is it material, then?

(Testimony of M. C. Schaefer.)

Mr. Holman: I want to cover with this witness what he saw in the field with respect to what would be the operating conditions, and therefore what would be the conditions that the contracting officer would take into consideration in making his payments. He has that authority under that provision that I read, your Honor.

The Court: Well, will you follow it up by showing that the contracting officer directed that the excavation be made on some other slope than 1 to 1?

Mr. Holman: No, sir, I cannot show that the contracting officer directed the slope to 1 to 1 or any [377] other slope, your Honor. As Mr. Nuttley testified, it was paid upon computation, it was not paid by fill, and as I read your Honor, the compensation shall be "except for the limitations above described, excavation for structures will in general be measured for payment to lateral dimensions one foot outside the structure, and to slopes 1 to 1 for common,  $\frac{1}{4}$  to 1 for rock." For instance, your Honor, if that were a slope in pure running sand, they would still only measure 1 to 1; that might be 3 to 1.

The Court: Yes, I appreciate that.

(Mr. Holman read further.)

The Court: Let's see, wait a minute, here. Is this what you read "That where the character of the material is such that it can be trimmed to the required lines without the use of intervening forms"?

Mr. Holman: That's right.

(Testimony of M. C. Schaefer.)

The Court: Doesn't that mean the character is such you can pour the concrete right against the wall?

Mr. Holman: Yes.

The Court: Is it your contention that in this dirt work the concrete could be poured right against the intervening wall?

Mr. Holman: No, it is not, your Honor.

The Court: Go ahead. I'm trying to get your contention. [378]

Mr. Holman: That's one of the exceptions; if that is the condition, that is the pay; they lose all the 1 to 1 slope.

The Court: How is that material, if there is none of that material on this job here.

Mr. Holman: Well, we haven't gone over our case yet.

The Court: Well, go ahead, I'll let you go into that matter of cross-examination.

Mr. Holman: May I finish this presentation, your Honor?

The Court: Yes, go ahead.

Mr. Holman: "Provided further, that for any excavations where in the opinion of the contracting officer the conditions warrant, the excavation will be measured by the contracting officer." That leaves it absolutely to the determination of the contracting officer for payment.

The Court: Yes, as to what should be paid for. Now, I'm trying to get your contention as best I can. Is it your contention that because the contracting officer has some latitude in ascertaining

(Testimony of M. C. Schaefer.)

what should be paid for, that that relieves the principal contractor of making a slope of 1 to 1 for the use of the subcontractor? [379]

Mr. Holman: Absolutely, your Honor, yes, it does, not only as a contract proposition, but a practical proposition.

The Court: If the officer of the Bureau then came in and said "Down here on this part of the work all you have to do is construct vertically, that's all we'll pay for" then you would be justified in making it vertical?

Mr. Holman: Because the material is such that they can pour right against the wall, yes, your Honor, then they wouldn't pay for that one foot out.

The Court: Do you seriously contend, Mr. Holman, that you can pour concrete against dirt such as you had down here without intervening forms?

Mr. Holman: Your Honor, I haven't seen this project, but I've waded through lots of Yakima soil, so I say no.

The Court: Well, I assume you know what the condition is down on this job.

Mr. Holman: Yes, I do.

The Court: And I don't believe you're making that contention, that you can pour concrete without forms, except in your rock work.

Mr. Holman: Not at all, your Honor, but that is one of the specifications; but now what I'm asking this [380] gentleman is whether or not he either made tests, or dug, or saw other excavations, and I think your Honor said he could answer.



(Testimony of M. C. Schaefer.)

The Court: Well, I'm not too sure about that. I don't get your point yet, Mr. Holman. I'm sorry I'm so obtuse, but I can't tell what you're driving at. Why is it material that he examined this soil condition?

Mr. Holman: I don't necessarily want to explain my purpose to the witness, but I want to know what this witness was informed about the general operating conditions there before he signed the contract.

The Court: Well, that might have some bearing on the way he performed, and the way he put his concrete in. I'll overrule the objection.

Mr. Olson: For the record, I'll not argue with your Honor, but just to put this additional matter in support of my objection, if the purpose of it is to show that excavation on any slope other than 1 to 1 was applicable to this project, the question is objectionable for the further reason that an entirely different situation might exist where the same contractor was making the excavation and installing the concrete structures. The contractor then might say "Sure, it's going to cost me more money to put in my concrete structures, but I'm going to save it on my excavations". Where the same [381] contractor is doing both types of work an entirely different situation would arise. On this project we had two separate contractors. The question is further objectionable on that ground.

The Court: Well, I'll overrule it, simply for the purpose of showing in a general way how familiar he was with the site.



(Testimony of M. C. Schaefer.)

Witness: Yes, I did see some other work.

Q. (By Mr. Holman): And did you see work where forms were being installed?      A. I did.

Q. And did you see work where concrete was being poured?

A. I don't remember whether they were pouring concrete at that time, but I seen work where concrete had been poured.

Q. In other words, you didn't see the movement of concrete over this general terrain and area at that time?      A. I did not.

Q. Did you make any inquiry as to the difficulty or reasonableness of movement of equipment such as yours over that area?

A. I figured that from my own knowledge, by driving over the terrain.

Q. In other words, you determined that the Mixomobile could travel over that area?

A. With certain load conditions. [382]

Q. That's what I'm getting at. Did you determine whether or not, at the excavations you saw, the excavation was out one foot out, at the base of the structure?

Mr. Olson: That's objected to, your Honor.

The Court: I'll sustain the objection. I don't think it is material.

Mr. Holman: I have an entirely different reason.

The Court: All right, what is it?

Mr. Holman: My reason is to ask this witness, if he was not satisfied by one foot out, as called for by the specifications, why he did not contract for a wider width.

(Testimony of M. C. Schaefer.)

The Court: He isn't claiming he asked for more than a foot. He's claiming he didn't get a foot, and 1 to 1, as I understand it, and it doesn't seem to me it is material what was done on some other sub-contract on this job. I don't know what the sub-contract was, and the record doesn't show.

Mr. Holman: What I'm asking is with respect to what he physically saw there with respect to other operations at the time. I want to know how well advised he was.

The Court: Objection sustained. We'll recess now for ten minutes.

(Short recess.) [383]

(All parties present as before, and the trial was resumed.)

### Cross-Examination

(Continued)

By Mr. Holman:

Q. When you talked with Mr. Macri after inspection in the field, and before signing the sub-contract on 1062, did you make any request for road inclusion?      A. Yes.

Q. How did you make it?

A. We told him that there was so many of the sand dunes, and there were spots throughout the ground there that would have to be corrected or some provision made for roads.

Q. Just a minute, I asked you how you brought the notice to him. I didn't ask you what he said. Was that oral?      A. That was oral.

(Testimony of M. C. Schaefer.)

Q. That was not followed by any writing at any time?      A. No.

Q. Now, then, you signed the sub-contract without such a provision in it?      A. That's right.

Mr. Olson: Now, your Honor, I ask that that last question and answer be stricken as to whether or not the sub-contract included such a provision in it. The sub-contract will speak for itself, as to whether it contained a provision for roads. We contend it does, and——

Mr. Holman: I think counsel's objection is [384] partially right. I would like to clear that up without any specific question. I didn't mean any catch question.

The Court: Perhaps you had better ask the question again, then.

### Cross-Examination

(Continued)

By Mr. Holman:

Q. Then you signed the sub-contract in evidence without having any specific provision typed in with respect to roads?      A. That is correct.

Q. And you signed the sub-contract without having any specific provision typed in with respect to a specified slope or bank?

Mr. Olson: I'm going to object to that. The sub-contract in that regard certainly definitely speaks for itself. In my opinion there is a definite provision in there where it incorporates the specifications.

(Testimony of M. C. Schaefer.)

Mr. Holman: That, your Honor, is a matter of law we're going to cover in our argument.

The Court: I'll sustain the objection to that. You might ask the same question with respect to everything questioned in the general contract.

Mr. Holman: I don't intend so to do, your Honor.

The Court: You might ask him if he signed it without any specific description of the size of the excavation to be made, and so on. I'll sustain the objection [385] to that.

Cross-Examination  
(Continued)

By Mr. Holman:

Q. Then had you at the time of the contract, did you know whether or not there was a lumber shortage? That is specifically provided as to lumber in the contract, your Honor.

A. Yes, I knew that lumber was getting hard to get, but——

Q. And did you know as to the requirement at that time to have priority in order to secure lumber?

A. That's right.

Q. And did you inquire of Mr. Macri as to whether or not he had a priority?

A. The lumber was a——

Q. Pardon me; answer my question, will you please, Mr. Schaefer? I asked you whether you inquired from Mr. Macri as to whether he had a priority to obtain lumber.

A. I believe I did ask him.

(Testimony of M. C. Schaefer.)

Q. And did you have a priority to obtain lumber at the time? A. Not on this job.

Q. No, but you had a priority.

A. On other jobs.

Q. As an operating contractor you had a rating, did you not? A. That's right.

Q. What was your rating?

A. I couldn't say. [386]

Q. And you then, knowing that condition, provided specifically for Macri furnishing lumber, because of the shortage and the difficulty of obtaining lumber, isn't that correct?

A. And because he told me that he had an interest in a lumber mill.

Q. Yes, so that Macri was better able to furnish the lumber? A. Correct.

Q. Yes; O. K. Now then, your contract also provides, as you will recall, that upon completion the forms shall be cleaned of concrete, nails shall be removed, and the lumber shall remain the property of Macri; you remember that, don't you?

A. That's right.

Q. Yes. Did you do that?

A. Not as far as Macri and Company took any of the forms right on from job number 1 over to job number 2, as soon as they were stripped from the structures on job number 1.

Q. Well, I'm in doubt whether you did it or not, then. Is your answer yes or no? Did you take the concrete off and did you take the nails out, or not?

A. Out of some of the forms, yes.

(Testimony of M. C. Schaefer.)

Q. And the others, what?

A. And the others they hauled off of the job number 1 over to job number 2 before there was such opportunity.

Q. Then the answer is you did not on the others, correct? [387]

A. That's right.

Q. All right. Now, between the time you signed the contract and I think you said April, when you first met with Mr. Macri, you had done——

A. No, it was March 15 that we signed the contract.

Q. You gave a date of a meeting with Mr. Macri. Do you remember that date? You had a memo in your lap yesterday. Do you remember that date?

A. These are dates from the daily reports, which weren't made up until after we got started on the job.

Q. You remember yesterday testifying about a meeting with Mr. Macri, do you not?

A. We had many meetings.

Q. Sir?

A. I say, we had many meetings with Mr. Macri.

Q. Do you remember testifying yesterday as to two specific dates when you had meetings with Macri on the job?

A. Yes.

Q. What was the first one?

A. The first was April 29.

Q. That's what I thought you said, April 29. Now, intermediately, between the time you signed the contract and April 29, what had your field force been doing?



(Testimony of M. C. Schaefer.)

A. Between the time of signing the contract and this meeting of the 29th, they had built form panels, they had built [388] some forms in the field, they had done lay-out work and fine grading, that is, helped Macri men to establish the grades, they had done some excavating, fine grading, some cribbing and back filling, that is, for the sub-grade. I think that's it.

Q. How many forms were in at the time of the meeting in April, if you know?

A. I couldn't say exactly.

Q. Any concrete poured?

A. No, no concrete poured.

Q. No concrete mixer or conveyor on the job at the time? A. No, there was not.

Q. It came up in July, did it not?

A. That's correct.

Q. Will you tell me, please, who was present at that first meeting with Mr. Macri in April?

A. At the first meeting there was brother, William E. Schaefer, Fred Waltie——

Q. Is he here, by the way, available?

A. Yes; Sam Macri, and his superintendent, George Staples.

Q. Now that, you say, was what date in April?

A. April 29.

Q. Thank you. And the next meeting you say was when? A. June 15.

Q. At that meeting who was present? [389]

A. At that meeting——

(Testimony of M. C. Schaefer.)

Q. Of course, you were at this meeting; you didn't name yourself.

A. Yes. There were present Sam Macri; an engineer——

Q. Who?

A. Mr. Cohen, that's Macri and Company's engineer; Al Hunter, of Rogers Insurance Agency——

Q. Is that your surety representation?

A. That's correct; Fred Waltie, our superintendent; and myself.

Q. And the first meeting occurred where; on the job, was it, or at the——?

A. On the job, out in the field.

Q. In the field. Do you remember where in the field with respect to laterals?

A. That was on lateral 1; well, on the first lateral, rather.

Q. 59.3, you mean?

A. I believe that's the number, **yes**.

Q. And where was the second meeting?

A. The second meeting was in the field.

Q. Where?

A. Well, we had been at the same lateral.

Q. On the same lateral?

A. On the same lateral.

Q. Do you have a tabulation, Mr. Schaefer, of the work that [390] was done with respect to structures, upon removing any material by excavation?

A. Excuse me, I didn't get that.

Q. Read the question.

(Whereupon, the reporter read the last previous question.)

(Testimony of M. C. Schaefer.)

Q. Excavation for structures by removal of material.

The Court: Perhaps you had better re-phrase the question, and ask for work upon structures.

Q. Do you have a tabulation of excavation by reference to structures, and work done by your crew?

A. Yes, I have a record.

Q. Will you produce it, please?

A. The daily reports.

Mr. Olson: The daily reports? A. Yes.

Mr. Holman: Counsel, I asked if he had a tabulation.

A. No, it's not tabulated; it's just on record there, on each daily report.

Mr. Holman: I wanted a statement, is what I wanted; the list or schedule of the stations and the work done.

The Court: Well, he says he hasn't prepared that.

Q. Do you have a list of any lumber that you purchased for [391] any of this work?

A. I do not.

Q. Did you purchase any lumber for this work?

A. I don't think so.

Q. May I have just a moment, your Honor?

The Court: All right.

Q. Mr. Schaefer, would you please, if you can, furnish me with a list of the jobs you currently had at the time this work was progressing? Strike that; that was 200 jobs you said, didn't you? That's too many.

A. I would say in excess of 200 jobs, yes.

(Testimony of M. C. Schaefer.)

Q. And could you furnish me a list showing how those jobs were broken up with respect to so many for buildings, so forth and so on; could you break them down into general classifications?

A. Well, that involves pretty nearly anything that's got concrete on it.

Q. May I ask just one question with respect to the situation; were they all in the Portland area?

A. I wouldn't be able to say that.

Q. Well, was your major operation in the Portland area?           A. Yes.

(Whereupon, Letter Bureau of Reclamation to Macri dated October 6, 1944, was marked Defendant Macri's Exhibit No. 40 for identification.) [392]

Q. Handing you what has been marked Macri's 40 for identification, do you have a copy of a letter of October 6 from the Bureau addressed to Macri, shown as having been sent you? Will you look in your file please, Mr. Schaefer?

Mr. Olson: Well, I'd suggest, your Honor, that I'm going to object to the introduction of this evidence, and before we have a copy of it——

Mr. Holman: Well, I want him to check to see if he has a copy, Mr. Olson. If he has, why——

The Court: What is the date of that?

Mr. Holman: October 6, your Honor, 1944.

Witness: No, I don't.

Mr. Olson: When you speak, speak out loud.

The Court: Yes.

(Testimony of M. C. Schaefer.)

Q. You do not have a copy?

A. I do not have a copy.

Q. Will you read the letter, and calling your attention specifically to the fact that the Bureau shows as transmitting a copy to you, tell me whether or not you did receive a copy of that letter?

A. Well, I wouldn't be able to swear to it, that we did or didn't.

Mr. Holman: Your Honor, I propose to offer this in evidence as binding upon the sub-contractor, since it [393] shows that a copy was transmitted, and the witness says he can't swear whether he got one or not, and it is marked as having sent a copy.

The Court: Do you offer it?

Mr. Holman: I do, your Honor.

Mr. Olson: I object, your Honor, on the ground it is wholly immaterial and irrelevant. It purports to be a demand on Macri Company for the Concrete Construction Company to furnish payroll. There is absolutely no issue made in this case whatsoever. If they are going to go into every little thing they contend Schaefer didn't do, or we contend Macri didn't do, we'll be here for a month. My point is it is wholly immaterial to whether we're entitled to damages against Macri or he's entitled to damages against us.

The Court: What is your contention?

Mr. Holman: I wanted to show, your Honor, that with reference to the Schaefer payrolls here for identification, the time of the first receipt by the government of any payrolls—

(Testimony of M. C. Schaefer.)

The Court: What have the payrolls to do with the issue?

Mr. Holman: Only to show the manpower, and so far as the government was concerned, as was testified, to show a proper compliance with the contract provision [394] with respect to wages, which is an obligation of the principal contractor, and therefore an obligation on the sub-contractor under the principal contract.

The Court: The matter of wages involved here, are they?

Mr. Holman: The matter of conduct of the job is, your Honor, and under payrolls I would like to indicate, if I may have the payroll, indicate to your Honor the only matter that is affected by this letter.

The Court: Well, we might shorten this a little. Is it your contention that this is evidence that Schaefer didn't furnish the payrolls?

Mr. Holman: Yes, sir.

The Court: You're using it as direct evidence?

Mr. Holman: Timely.

The Court: What's that?

Mr. Holman: I'm showing that he did not furnish the payrolls timely, as required by the contract.

The Court: Well, then the objection is sustained. It isn't competent evidence that he didn't furnish the payrolls. It is a letter written by somebody claiming he didn't.

Mr. Holman: Well, may I have the payrolls, then, your Honor? It may make it competent.

The Court: It would make it what? [395]



(Testimony of M. C. Schaefer.)

Mr. Holman: It would prove this letter.

The Court: The point I'm making, Mr. Holman, a letter written by somebody from the Bureau of Reclamation to Macri stating Mr. Schaefer didn't furnish certified copy of the payrolls is not competent evidence that he didn't. It isn't even competent as notice to Schaefer that it was mailed or received.

Mr. Holman: He says so.

The Court: You know better than that, Mr. Holman, the fact that he says it was mailed.

Mr. Holman: No, until I can get Mr. Nelson.

The Court: All right, the objection is sustained.

Cross-Examination  
(Continued)

By Mr. Holman:

Q. Now, with reference to Macri's identification 16, I call your attention to the first payroll on Concrete Construction Company, which is shown for the week of what, Mr. Schaefer?

A. Well—week ending March 15.

Q. March 15, 1944; and the verification on the bank, by you, on October 18, 1944; do you see that, before a notary public?

The Court: What identification is that?

Q. This is 16, your Honor. Do you see that, Mr. Schaefer?      A. Yes.

Q. And then the stamp on the front, United States, Yakima, [396] Washington, received October 20, 1944?      A. That's right.

(Testimony of M. C. Schaefer.)

Q. Now, I call your attention to the intermediate payrolls up to, just generally here, to save time, up to October 9, the week of October 9——

A. October 4.

Mr. Olson: If it will save any time, do you want to introduce those payrolls into evidence?

Q. No, that's not the purpose; and the stamp of the Bureau upon the payroll for October 4—I'll only go through October 4—the stamp of the Bureau, October 20, 1944, is it or is it not a fact that until after October 6, and the writing of the identification 40, that you furnished neither the Bureau nor the principal contractor with any payrolls?

Mr. Olson: That's objected to, if the Court please, that it is wholly immaterial when these payrolls were signed.

The Court: Sustained.

Mr. Holman: I would like a specific exception both as to that and to the non-admission of this letter, 40.

The Court: If you think you need an exception under the Civil Rules of procedure, I don't think you do, but you may have it for what it is worth.

Mr. Holman: Your Honor, I don't mean to do that, but it is a matter of old training under the old rules, and I'm sorry.

The Court: All right, let's proceed.

Q. I don't wish to offend by your Honor's ruling, and do not answer this question, Mr. Schaefer, but I want to clear this one point. Did you at any time furnish Macri and Company with any copies of your payrolls?

(Testimony of M. C. Schaefer.)

Mr. Olson: Did we furnish them to Macri and Company?

Mr. Holman: Yes.

Mr. Olson: I object to that as being immaterial. I don't see how it affects the issue of this case. If I'm missing something, if counsel will point it out—

The Court: How does it?

Mr. Holman: Just the feel of the job, your Honor; here are two contractors operating——

The Court: I think we've got troubles enough without going into the feel of the job.

Mr. Holman: The feeling of the job——

The Court: That's not definite enough. If you can show me any definite purpose for this payroll, I'll reconsider my ruling. Come on, let's proceed with the cross-examination of this witness, Mr. Holman; you're taking too much time. [398]

Mr. Holman: May I suspend at this time, your Honor?

The Court: No, you may not; you may go ahead.

Mr. Holman: You may inquire.

#### Cross-Examination

By Mr. Hawkins:

Q. Mr. Schaefer, you say it was March when you were first out to this area?

A. March of '44, yes.

Q. March of '44. Was the road frozen at that time?

A. Road frozen?

Q. Yes.

A. No.

Q. The ground was hard, was it not, in '44, in March?

A. No, I wouldn't say that.

(Testimony of M. C. Schaefer.)

Q. You wouldn't say that? It was soft? Well, was it wet?

A. I wouldn't say that it was wet.

Q. You don't remember what it was like?

A. I believe it was quite dry out there. In fact——

Q. Yes, that's what I'm getting at. It was quite dry and soft, isn't that right?

A. Well, it was soft, sure.

The Court: You'll have to speak up.

A. It is soft as compared with—it wasn't as soft as it was at times out there; I'd say it wasn't as solid as it was at times out there. [399]

Q. It gets softer as the summer progresses, doesn't it?      A. It gets softer the drier it gets.

Q. And you were there in March, and you first started on the job in July?      A. No.

Q. You first started pouring?

A. We first started pouring.

Q. The 30th or 31st of July?

A. The last day of July, yes.

Q. That's when you started pouring. Now, what sort of a truck was this you carried this Mixomobile on?      A. A Ford truck.

Q. And what tonnage was that?

A. The tonnage on that I believe I stated——

Q. On the truck?

A. Well, the truck and the mixer is one combination; it's a manufactured combination.

Q. It is a unit?      A. It is a unit.

Q. And the whole thing weighs 11 tons?

(Testimony of M. C. Schaefer.)

A. Well, that's what I thought it was, but since I've checked with one of my men here, and he says that that would be——

Mr. Holman: Just a minute; may it please the Court, I object to a conversation between him and his men. [400]

The Court: Yes, that's sustained. You can't tell what the conversation was.

Witness: ——and they told me——

Mr. Olson: The Court says you can't tell what he told you. If you wish to correct your previous estimate I'm sure you may do so.

#### Cross-Examination

(Continued)

By Mr. Hawkins:

Q. Just tell us what it weighs now.

A. About 9 tons.

Q. Is that loaded or unloaded?

A. That is unloaded.

Q. And how much tonnage do you have when it is loaded?

A. Well, it is at the station at the time it is loaded.

Q. Well, I don't care about that. How much does it weigh when it is loaded?

A. Well, about another two ton; that's with a one-yard batch, and that's what we were using, and a two-yard batch, why, it would have about four ton of concrete.

Q. In other words, it would vary between 11 and 13 tons loaded, is that right? A. Yes.

(Testimony of M. C. Schaefer.)

Q. Didn't you anticipate some difficulty moving that vehicle around loaded with cement, when you were out there in March?

A. It wasn't so much that we were driving around there with [401] that vehicle loaded; I did anticipate——

Q. Just a moment, now. I wish the Court would instruct this witness to answer my questions. Now, they're perfectly simple; even I understand them, and I think this witness shouldn't have any trouble; he's a big contractor.

The Court: No remarks, Mr. Hawkins. Read the question, Mr. Taylor.

(Whereupon, the reporter read the last previous question.)

The Court: Just answer the questions directly, Mr. Schaefer.

A. Yes, I did.

Q. Now, Mr. Schaefer, did you ever have any dealings with Mr. Goerig or Mr. Philp?

A. I did not.

Q. In fact, you knew—in fact, you did not know that they had any connection——

Mr. Holman: Just a minute. Objected to for the purpose of law as immaterial, irrelevant, outside the issue, a contract between the parties——

The Court: Well, I'll overrule it. The legal effect would be considered.

Mr. Olson: I would like for the record to join in the objection.

The Court: All right. [402]



(Testimony of M. C. Schaefer.)

Cross-Examination

(Continued)

By Mr. Hawkins:

Q. You did not know at any time prior to the time that you started this suit that either Mr. Goerig or Mr. Philp had any connection with either of these projects, isn't that right?

A. That is correct.

Q. And it was not until after you filed your first complaint in these actions that you learned for the first time that Goerig or Philp might have some connection with these jobs?

Mr. Holman: Same objection.

Mr. Olson: Same objection.

The Court: Overruled.

Q. What is the answer?

A. That is correct.

Mr. Hawkins: I have no further questions, your Honor.

The Court: Mr. Ivy, do you have any questions?

Mr. Ivy: Yes, I do, your Honor.

The Court: All right.

Cross-Examination

By Mr. Ivy:

Q. Mr. Schaefer, you stated that April 29 was the first meeting with Macri on the job?

A. That is—I've met Mr. Macri on the job before, for purpose of complaining about the excavation, but not as to [403] the meeting at which we had more of a meeting.

(Testimony of M. C. Schaefer.)

Q. When was the first meeting at which you told him he must do certain things for you to continue on the job?

A. Oh, we talked about—that is, as to my saying that we wouldn't continue on the job unless he did certain things?

Q. That's right.

A. No, that was the first time.

Q. That was April 29?           A. Yes.

Q. Now, have you made a segregation of your costs prior to April 29 and subsequent to April 29 on 1062?

A. We have them by months. I have it listed, the expenses——

Mr. Olson: I might state to counsel that I intend, with your Honor's permission, to put Mr. Schaefer back on the stand at the close of the case, with reference to the cost items; is that what you're getting at?

Mr. Ivy: That's right.

Mr. Olson: And that will be available at that time, if that is agreeable to you, Mr. Ivy.

Mr. Ivy: And having particular reference to the Surety Company's position in the case, your Honor.

The Court: Yes.

Mr. Ivy: So as I understand it, then, Mr. Olson, you will before the case is over have a segregation made?

Mr. Olson: I'm going to put Mr. Schaefer on the [404] stand at the close of my case to testify as to his costs, at which time you can cross-examine him

(Testimony of M. C. Schaefer.)

as to what the items are for, and also have a C.P.A. who's went over the payrolls, over the entire expenses, who will also be available for cross-examination.

Mr. Ivy: On that basis, your Honor, I'll not direct any questions to the specific items.

Cross-Examination

(Continued)

By Mr. Ivy:

Q. Your next main meeting on the job with Mr. Macri was June 15, is that correct? A. Yes.

Q. At that time you again, did you not, state that you would not continue unless he did certain things? A. That's right.

Q. What were the things that you were requiring him to do in order for you to continue?

A. To change his method of excavation, and to do his own excavating instead of forcing it on us to do.

Q. You then did a certain amount of excavating not required by the contract?

A. That's right.

Q. And you have the cost of that segregated, do you? A. No.

Q. Now, what other matters were you requiring Mr. Macri to do in order for you to stay? [405]

A. For him to supply lumber, and to not only do the excavating according to specifications, but to get on with the excavation so we could make some progress in our work.

(Testimony of M. C. Schaefer.)

Q. You complained of his delay?

A. That's right.

Q. And what else, Mr. Schaefer?

A. Well, there was his general excavating, the hand excavating, and fine grading, the lumber, and the slowness of his progress in doing that work and supplying the lumber.

Q. And those were all matters required of him under his contract and under the sub-contract with you?

A. That's correct.

Q. And are those the matters complained of in your first cause of action, Mr. Schaefer?

A. Yes.

Q. Making up the amount asked for in your first cause of action?

A. That's right.

Q. And are they also the amounts asked for in your second cause of action, making up the alternate cause?

Mr. Olson: Your Honor, I think the pleading answers that pretty well. Frankly, I prepared the pleadings; Mr. Schaefer didn't.

The Court: Yes, he might not know specifically what is contained in his cause of action. If you don't [406] know, you can say so.

Witness: I don't get that.

Q. You don't know? That's all.

### Redirect Examination

By Mr. Olson:

Q. Mr. Schaefer, the question asked you about lumber; with reference to the sub-contract what did

(Testimony of M. C. Schaefer.)

Mr. Macri tell you about lumber and his ability to get lumber?

A. He said he'd have no problem in supplying lumber.

Q. Did he say why?

A. He had an interest in a lumber mill.

Q. Is there anything else he said about supplying the lumber, the time he could supply it?

A. He says "You'll have plenty of lumber; you don't have to worry about anything".

Q. Now, with reference to the road situation, counsel went into that, what was said by Mr. Macri to you in connection with the roads. and approximately when was it said, with reference to whether made before or after the contract?

A. Well, before we signed the contract we talked to him about the roads, before we submitted our figure on the job, and he said we didn't have to worry about the roads, that they had to get in there to do their own work, and that the roads would be satisfactory. He said "You won't have any trouble on the roads" and then after we signed the contract, and previous to submitting a figure on [407] 1068 we went over the site on job 2, and at that time was riding in Mr. Nelson's, that's Harold Nelson of the Bureau of Reclamation, car, Mr. Macri, brother William E. Schaefer, Harold Nelson, and myself, and brother Bill asked him about the road situation, and he said "Well, that will be the same as on job 1 there, you don't have anything to do with the roads, that's our item, we take care of the

(Testimony of M. C. Schaefer.)

roads. You won't have any trouble; we've got to get in there with our own equipment, to do our work, and you won't have any difficulty."

Q. When was that you're talking about, 1068, with reference to whether you had then started performing 1062 or not, Mr. Schaefer?

A. We had been working in the yard on 1062.

Q. Well, you were working in the yard; had you been out on the field yet, pouring concrete, at this time?

A. No, we weren't pouring any concrete. We may have been setting forms. I wouldn't—I don't think we were setting forms at that time.

Q. When was it with reference to the date that the sub-contract bears on 1068? Was it before that time, or after it?

A. It was before we signed the contract on 1068.

Q. Now, Mr. Schaefer, did you complete the installation of all concrete structures on job 1062?

A. We did.

Q. And do you know the date that you completed that work?

Mr. Hawkins: Your Honor, I submit this is not proper redirect examination.

Mr. Holman: I join, your Honor, and I also object it is not the best evidence. The government record is the best evidence.

The Court: Overruled.

A. I believe it was April 8 that the last man pulled off the job and come back to Portland.

Mr. Holman: I move that be stricken, your Honor. It is not responsive.



(Testimony of M. C. Schaefer.)

Mr. Olson: I asked when he finished it.

The Court: I understood him to say April 8 was the date of finishing, is that right?

A. It was the day before that; it would be the 7th that they finished, and then they came in on the 8th. They probably picked up a few tools at the job site on the 8th.

Q. Then the answer to the question is you finished on April 7?      A. That's right, yes.

Mr. Olson: That's all, subject to recalling Mr. Schaefer on the amounts.

The Court: We'll suspend now until 1:30. You'll have a chance for re-cross then. [409]

(Whereupon, the Court took a recess in this cause until 1:30 o'clock p.m.)

Yakima, Washington, February 26, 1947

1:30 o'Clock P.M.

(All parties present as before, and the trial was resumed.)

Mr. Olson: Had I finished before lunch?

The Court: I think you had. If you have any further questions, however, you may ask them, on redirect.

Redirect Examination

(Continued)

By Mr. Olson:

Q. Yes, there was one thing. Counsel for Philp and Goerig asked you, Mr. Schaefer, about moving

(Testimony of M. C. Schaefer.)

the mixer loaded with cement. Would you just explain what was the situation with reference to moving the mixer when it was loaded with cement?

Mr. Hawkins: Your Honor, I object to that question. I don't think that relates to the nature of my examination. I was merely asking him about the weight of the vehicle, not how he moved it around. I don't think it is proper redirect.

The Court: I thought there was some matter gone into as to the difficulty of moving the mixer loaded on the roads, is that correct? I'll overrule the objection.

Witness: The mixer wasn't loaded when it was moved about from structure to structure. The maximum amount [410] of concrete in the mixer when moving from one structure to another was perhaps half a yard of concrete. It was not a loaded mixer.

Q. Mr. Schaefer, you referred to certain pictures taken of some lumber. Do you have those with you? A. I have.

Mr. Hawkins: Your Honor, I again object. I don't think this is proper redirect.

The Court: I don't think it is, but if you wish to re-open your direct and put in these pictures, I'll consider that.

Mr. Olson: I move to re-open.

The Court: Yes, all right.

Mr. Olson: I'm not anxious that they be marked separately. If there is any way they can be marked otherwise, I think they all relate to lumber; if you want to give them one exhibit and then a sub-letter under each one.

(Testimony of M. C. Schaefer.)

The Clerk: You don't want them fastened together?

Mr. Olson: Well, if they can be stapled together I have no objection to that.

The Court: And I assume that they all are of the same character, that is, they are pictures of lumber?

Mr. Olson: Yes.

(Whereupon, six photos of lumber, taken September 22, [411] 1944, were marked Plaintiff's Exhibit No. 41 for identification.)

### Redirect Examination

(Continued)

By Mr. Olson:

Q. Mr. Schaefer, showing you plaintiff's identification 41, consisting of six pictures, just state first what they are, without going into any detail, just what they are—I'll withdraw that. Did you take those pictures, Mr. Schaefer? A. I did.

Q. Yourself? A. That's right.

Q. And on what date?

A. On September 22, 1944.

Q. And whereabouts did you take them?

A. At the yard site of job 1062.

Q. And what did you take a picture of?

A. I took a picture of lumber; the lumber—

Mr. Holman: Just a minute, your Honor. I submit the pictures would be the best evidence.

Q. Well, I assume he's trying to show they're pictures of something involved in this action. What lumber is it, Mr. Schaefer?

(Testimony of M. C. Schaefer.)

A. It is of the used lumber that Macri Company supplied us on the job, and there's one picture——

The Court: Perhaps you had better let your counsel [412] ask the question, rather than volunteer.

Q. Directing your attention to the second picture from the top of this group that is stapled together on plaintiff's identification 41, I'll ask you what that picture was taken of.

A. That picture indicates——

Mr. Holman: Just a minute.

Q. Never mind what it indicates. Just what is it taken of?

A. It is taken of lumber that—or a vacant space where lumber would normally be for our use.

Mr. Holman: I move that that latter part be stricken, your Honor.

The Court: Go ahead. This is all preliminary to the offer of the pictures, I assume.

Mr. Holman: The only objection I had, your Honor, was "where lumber normally would be." I think that is volunteered.

Q. Mr. Schaefer, you mentioned that the pictures in general were pictures of used lumber that was furnished? A. That's right.

Q. Now, directing your attention to the second picture of this group, is that a picture of the used lumber, or is it a picture of something else?

A. That's a picture of other lumber, I believe that belonged to Macri or the Bureau, but was not for our use. [413]

(Testimony of M. C. Schaefer.)

The Court: Is that identified in any way, separately?

Mr. Olson: As the second picture, your Honor, in the group.

The Court: Second in the group; yes, I see.

Mr. Hawkins: We have no objection to that, your Honor. I notice some of these pictures are color. Is that actually the case, or were they tinted up?

Witness: No, that there was taken with a colored film.

Mr. Holman: We have no objection to the introduction of the pictures as speaking for themselves. We do object to the testimony volunteered by the witness with respect to them, your Honor.

The Court: Well, that will be stricken, and it would seem to me the second picture would be subject to objection. Of course, none is made. Didn't he say that was lumber that belonged to somebody else?

Mr. Olson: Well, I'll interrogate about that, because if it's not this lumber, I don't want it.

Mr. Hawkins: We have no objection. What it is is a picture of a space between two piles, and I think he testified that was where his lumber should have been.

The Court: I don't think that would be competent evidence of a failure to furnish lumber, but you may inquire further. [414]

(Testimony of M. C. Schaefer.)

Redirect Examination

(Continued)

By Mr. Olson:

Q. Can you explain, Mr. Schaefer, what the second picture of identification 41 is supposed to show?

A. It shows that there were no two by fours on the job.

Mr. Hawkins: Just a moment. I move that answer be stricken. I think the picture speaks for itself.

The Court: Yes, that will be stricken.

Mr. Olson: I'll follow that up.

Q. There are, I believe, Mr. Schaefer, some two by fours in that picture. Were those two by fours there for your use?

Mr. Holman: I object to that, your Honor, as testifying on the picture. The witness can testify off the picture, as to facts.

The Court: I think he's trying to show what the picture shows, to determine whether it is admissible. I'll overrule the objection.

Q. You may answer.

A. They were two by threes.

Q. I'll ask you, Mr. Schaefer, if the blank space on this picture, between the two piles of lumber, is the space where Mr. Macri placed the two by fours that he furnished you for use on this job?

A. Yes.



(Testimony of M. C. Schaefer.)

Q. And were there any two by fours on the yard at any other [415] place other than this on September 22? A. No, there was not.

The Court: Is there any objection now?

Mr. Holman: I think not, your Honor. The pictures speak for themselves.

The Court: Well, we'll admit them.

(Whereupon, plaintiff's Exhibit No. 41 for identification was admitted in evidence.)

The Court: All right, recross, and also cross on this new direct.

#### Recross-Examination

By Mr. Hawkins:

Q. Mr. Schaefer, how many thousands of board feet of lumber were furnished out on this job?

A. Excuse me?

Q. How many thousands of board feet of lumber were furnished on this job?

A. I do not know.

Q. Would it be in excess of two hundred thousand board feet? A. No, I wouldn't say so.

Q. Would it be in excess of one hundred thousand board feet? A. I wouldn't say so.

Q. The truth is, you just don't remember?

A. Well, we had no tally on the lumber that was delivered. They never gave us a tally on it.

Mr. Holman: Could you speak up? [416]

A. They never gave us a tally on the lumber.

(Testimony of M. C. Schaefer.)

Q. Now, then, the lumber shown on these pictures which have just been admitted amounts only to 20 or 30 board feet, does it not, sir?

A. No, there's more than 20 or 30 board feet on those pictures.

Q. About how much, about 100?

A. I never give it an idea at all, as to how many board feet there are shown on there. Just as a guess, there would probably be 300 board feet.

Q. About 300 board feet?

A. My understanding was that there were about 5000 feet delivered.

Mr. Holman: May I have that answer?

(Whereupon the reporter read the last previous answer.)

Mr. Olson: What do you mean by that, Mr. Schaefer?

A. 5000 feet of that type of lumber.

Mr. Holman: I move that answer be stricken, your Honor. It is quite ostensibly based on hearsay.

The Court: Well, counsel asked him if he knew how much lumber was furnished, and he's given his best estimate.

Mr. Holman: For the entire job, and he says about 5000 feet of this kind. That I submit is not a proper [417] responsive answer.

Mr. Olson: They then came back and said if this wasn't a small part of it, and he said there was about 5000 feet of this type of lumber.

The Court: Well, I'll permit the answer to stand.

(Testimony of M. C. Schaefer.)

Recross-Examination

(Continued)

By Mr. Hawkins:

Q. As I understand your testimony, there was about 5000 board feet of lumber of this kind shown in these pictures delivered on the job; that's your guess? A. That is right.

Q. And you do not know what the total amount of lumber was? A. No, I do not.

Q. And you wouldn't hazard a guess as to that, although you're able to guess as to this type of lumber?

A. That is taken from the record, I believe; that's my idea of the 5000 feet, comes from the record of the daily report.

Q. That was made to you?

A. That was made to me, yes.

Q. But you have no idea of the total amount? Let's get that point clear.

A. No, there was never any figure shown on the daily report.

Q. It might exceed 150,000, for all you're able to tell right now? A. That's right. [418]

Mr. Hawkins: That's all.

Recross-Examination

By Mr. Holman:

Q. Did you have an estimate, Mr. Schaefer, of the amount of lumber required for the forms on this job?

A. No, I never made out a full estimate.

(Testimony of M. C. Schaefer.)

Q. Never made an estimate. Did you talk over with Mr. Macri the quantity of lumber required for forms for this job?

A. No, only as far as stating that when he asked me how much I had figured or would figure for lumber, I told him that was about \$4.00 a yard.

Q. About—

A. \$4.00 per—figured on the yardage basis; that is the basis on which our figure went in there, at \$26.00.

Q. Wait a minute. You mean you figured out of your \$26.00, \$4.00 was for lumber?

A. No, that was above the \$26.00.

Q. In other words, if you furnished the lumber it would have been \$30.00?

A. Well, there were other figures at that time, which would have included a certain profit on that lumber, and so forth, but when we talked about the lumber. I told Mr. Macri I didn't want anything to do with the lumber. He said "You don't need to." He said, "How much did you figure in there, or how much did you figure you would [419] have to have on lumber?" I said about \$4.00 a yard.

Q. That means \$4.00 per cubic yard of the concrete structure excavation, item 12?

A. Of the concrete, which according to the specification was 1515 yards.

Q. Item 12, sir?

A. Well, I wouldn't be able to say whether it was item 12, unless I looked at the specs.

Mr. Olson: Well, I think it is item 12.

(Testimony of M. C. Schaefer.)

A. Well, if the concrete for structure is item 12, that's it.

Mr. Olson: I submit, your Honor, the specifications will show that. A. That's right.

Q. Then your answer is that you were talking on that with respect to item 12, right?

A. That's right.

Q. So that if there was 5000 feet of this kind of lumber as shown by those photographs, it is your contention that there was about \$20.00 of inferior lumber, is that right? I mean you were damaged 5000 feet times \$4.00 a thousand, weren't you?

A. This lumber here is just an indication of the poorest lumber that we had on the job. There was other——

Q. You said—go ahead, sir. [420]

A. There was other lumber from good to bad, and this was the worst.

Q. But I say that this is a \$20.00 item so far as your original figuring was concerned?

A. I don't know how much Mr. Macri paid for this lumber. If it is 5000 feet of lumber, you're not buying it for \$4.00 a thousand. It can't be \$20.00.

Q. You had it figured at \$4.00 a thousand as cost to you, did you not?

A. \$4.00 a yard of concrete.

Q. \$4.00 a yard of concrete?

A. That's right.

Q. And how many thousand feet would go in a yard of concrete; would be used in a yard of concrete? How many feet, about, for a yard of concrete?

(Testimony of M. C. Schaefer.)

A. To place a yard of concrete would probably average, in the form as set, would probably take 150 board feet.

A. To pour one yard of concrete.

Mr. Holman: Very well, that's all.

The Court: Do you have any questions, Mr. Ivy?

Mr. Ivy: No questions, your Honor.

The Court: Any further questions from this witness? Call the next witness, then. [421]

PATRICK L. DARCY

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Olson:

Q. State your name, please?

A. Patrick L. Darcy.

Q. Where do you reside?

A. Portland, Oregon.

Q. By whom are you employed?

A. Concrete Construction Company.

Q. Now, with reference to specifications 1062 of the Bureau of Reclamation project, Roza Division, what if any connection did you have with that job?

A. I was superintendent of all operations on that job from the 10th of August until the finish of the job.

Q. Would you give the year, Mr. Darcy?

A. 1944-'45.



(Testimony of Patrick L. Darcy.)

Q. You went on the job, then, on what date?

A. I started first on that job the 29th of June, '44.

Q. What experience have you had, Mr. Darcy, in construction work, particularly concrete construction work, excavation work, work of that kind, and over what period of time?

A. Well, general construction of concrete, general construction altogether, building, including concrete dam [422] work, bridge work, everything of a concrete nature, over a period of about twenty-two or three years.

Q. And in connection with that experience are you able to—have you had to do it and are you able to figure elevations and sub-grades?

A. Most assuredly.

Q. And was that a part of your work in connection with specifications 1062?      A. Yes.

Q. Now, showing you, Mr. Darcy, plaintiff's identification 22, I'll ask you to state what that is, if you can?

A. As it is assembled it is a complete location area map of the project 1062 of the Roza Division.

Q. And the tail end of the map or whatever it is, that's overlapping underneath, what is that?

A. This is a two section plan of the area, and this is the overlap of each section on the area, which has been turned back with a division line across the center, taped to crease.

(Testimony of Patrick L. Darcy.)

Q. Do we understand, then, that this part that is underneath that map could be detached, disregarded, and have no reference to the map itself?

A. That's right.

Mr. Olson: Do you want that detached?

Mr. Holman: I don't care. [423]

Q. Now, there are certain figures on this identification 22. Would you explain what those are, Mr. Darcy? A. Well, these read—do you—

Q. Did you put those on?

A. I did; I put all these marks on here, that aren't on a blue print of the Bureau's reproduction. The red dots is the structure locations, and the pencil marks in numbers are the structure numbers of the structure at that location.

Q. Now, is there another number that is a part of the blue print itself? A. There are.

Q. And what are those numbers?

A. They are the designation of the laterals and stations.

Q. Designation of the laterals and stations; and who furnished you with the blue print itself?

A. This was furnished by the Bureau of Reclamation.

Q. And in connection with what job?

A. 1062, for the purpose of locating the structures.

Q. Now, Mr. Darcy, the stations that you refer to, how does that tie in with the other Bureau of Reclamation records, and particularly the structure lay-out plan?

(Testimony of Patrick L. Darcy.)

A. Well, each structure lay-out plan has a station marked on it, designating which station on the location map that that is to go to, and the corresponding station mark is [424] on this map.

Q. I wonder, Mr. Darcy, handing you plaintiff's Exhibit 12, if you could just show the Court the marking on these that is the station mark?

A. On Lateral 59.3 on the structure lay-out plan the station mark would be 5 plus 00.

Q. Now, would that station mark also appear on the location map?

A. Not as a number; as a point.

Q. Well, do they generally, Mr. Darcy—the station marks on the structure lay-out plans, do they also appear as a station number on your location map, or not?      A. Not as numbers.

Q. All right; then how do you find out from the structure lay-out plan where that particular structure would go, on the map?

A. By the designation of markings which are shown on a code up in this corner.

Q. When you say "up in this corner" you're referring to plaintiff's identification 22?

A. Right there. There's a key mark showing a code of location and type of structure on the lateral, all the way through.

Mr. Olson: We re-offer our identification 22 in evidence. [425]

Mr. Holman: May I see this code on here?

Q. Now, the code mark, are you referring to what appears under "Explanation?"

A. Explanation.

(Testimony of Patrick L. Darcy.)

Q. And who put that on the map?

A. That is Bureau data.

Q. Bureau of Reclamation?

A. Bureau of Reclamation data.

Mr. Holman: May I ask a question, your Honor?

The Court: Yes.

Q. (By Mr. Holman): Mr. Darcy, do I understand that each structure is numbered on this the same as in the lay-out plan; you have, in other words, structure number so and so marked on here as structure number so and so?

A. That's right.

Q. You have on this in several places by irregular lines in red and the word "eliminated"; that is an indication of revisions as shown on the lay-out, is it not? In other words, if they eliminate a structure, or revise it?

A. That will be found on structure lay-out plans in here, as a cross across the plan, marked "eliminated."

Q. (By Mr. Olson): This relates to 1062 only? Counsel was just asking me. A. Only. [426]

Mr. Holman: Without admitting the correctness of the location, your Honor, there is no objection to the map as supporting the witness' testimony, in support of his testimony.

The Court: Do you have any objection, Mr. Hawkins, to the offer of this map?

Mr. Hawkins: No, your Honor; no objection.

(Testimony of Patrick L. Darcy.)

The Court: It will be admitted for the purpose of illustrating the testimony of this and other witnesses.

(Whereupon, Plaintiff's Exhibit No. 22 for identification was admitted in evidence.)

Mr. Olson: Counsel will stipulate that the overhand there that has nothing to do with it, on the back, may be detached by the clerk.

The Court: Yes, I was going to suggest that. It certainly would be less confusing to the appellate court.

Mr. Holman: Yes, I think it should be cut off.

#### Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Darcy, are the stations as designated on Exhibit 22 correctly located on that location map?

A. Yes, they are.

(Whereupon, Map showing relation in location of specifications 1062 and 1068 was marked Plaintiff's Exhibit No. 42 for identification.)

Q. Now, Mr. Darcy, showing you plaintiff's identification [427] 42, I will ask you what that is?

Mr. Holman: Mr. Olson, for the purpose of saving time, if it is the same thing as the other job——

Mr. Olson: I'll show it to counsel, then. The only purpose of this map is to show the location of 1068 with reference to 1062.

(Testimony of Patrick L. Darcy.)

Mr. Holman: I have no objection, your Honor.

The Court: Mr. Hawkins, have you seen this map?

Mr. Hawkins: Yes, I've examined it. There is no objection.

The Court: Mr. Ivy, I haven't mentioned you. If you should have any objection, just speak up, and I won't ask you each time. Admitted.

(Whereupon, Plaintiff's Exhibit No. 42 for identification was admitted in evidence.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Darcy, would you step down to plaintiff's identifications 23, 24, 25, and 26?

Mr. Holman: May I ask one question about 42 before that? You said it would show the relative positions of 1062 and 1068. Do you mean 1062, 1 and 2, and 1068?

A. 1068 is number 2, as you've been speaking of it.

Mr. Holman: There are two schedules in 1062; are they both shown on that? [428]

A. That is just a general area map. That is the Roza Division.

Mr. Holman: That is the whole of 1062, then, shown on that?

A. Yes.



(Testimony of Patrick L. Darcy.)

Direct Examination  
(Continued)

By Mr. Olson:

Q. Mr. Darcy, referring first to plaintiff's identification 23, I'll ask you first who prepared that?

A. I did.

Q. Will you then relate what that identification is?

A. That is an assembly of a structure placed in a correct excavation as designated by the specifications.

Q. Excuse me——

Mr. Holman: I move that answer be stricken as a conclusion of the witness.

The Court: All right; stricken.

Q. Directing your attention to identification 23, Mr. Darcy, that specific identification consists only of the box model, and does not include the structure. The structure in the center is a separate exhibit. Now, I'll ask you again to state, Mr. Darcy, what plaintiff's identification 23 is.

A. That is an excavation model; the model of an excavation as required by specifications.

Mr. Holman: I move that be stricken, your Honor. [429]

The Court: Overruled.

Q. Can you tell us which structure that is a model of?

A. That was taken of 427-428, a double structure, road crossing outlet.

(Testimony of Patrick L. Darcy.)

Q. Now, would you just proceed, Mr. Darcy?  
Well, first, the banks on that structure as prepared by you are to what slope? A. One to one.

Q. And the lateral excavation with reference to the distance laterally from the outside of the structure is to what distance? A. One foot out.

Q. I'll ask you first, is that prepared to scale?

A. That is prepared to scale.

Q. And to what scale?

A. 15/100 of actual size; 15/100 of one foot to a foot; 15/100 of a foot against a foot of actual size.

Mr. Olson: We offer plaintiff's identification 23 in evidence.

Mr. Holman: I object to it, your Honor, for the same reasons as previously urged in the record, that the specifications do not require a slope of one to one, nor does the sub-contract, or is it a matter determinative, other than by the court as a matter of law; the one to one slope does not control. [430]

The Court: Any further objections?

Mr. Hawkins: No further objections.

The Court: Overruled; it will be admitted.

(Whereupon, Plaintiff's Exhibit No. 23 for identification was admitted in evidence.)

(Testimony of Patrick L. Darcy.)

Direct Examination  
(Continued)

By Mr. Olson:

Q. Now, Mr. Darcy, if you will refer to plaintiff's identification 24, I will ask you to state what that is? Well, first, I'll ask you who prepared that? A. I did.

Q. And to what scale is that prepared?

A. The same scale, 15/100 of actual size.

Q. And what is it?

A. It is a model of the structure 427-428, on project 1062.

Q. The wood portion of that identification 24 is what? What does it show?

A. You mean this part out here?

Q. Yes, the wooden portions.

A. That represents the forms that held the concrete.

Q. And the gray portion in between the wooden form is what—indication of what?

A. It represents the concrete we poured in the form for the structure.

Q. And plaintiff's identification 24 has what reference, if any, to plaintiff's Exhibit 23? [431]

A. This was made to go in that portion of the exhibit, as a complete unit of a structure in an excavation.

Mr. Olson: We offer plaintiff's identification 24 in evidence.

(Testimony of Patrick L. Darcy.)

Mr. Holman: I would like to ask a question if I may, your Honor.

The Court: All right.

Mr. Holman: Is this a correct representation of the structure as poured by the Concrete Construction Company at that station?

A. That's right.

Mr. Holman: For the purpose of the record I take it I don't have to repeat, your Honor. Same objection.

The Court: Same objection you had to the other? The record may show that.

Mr. Holman: It would go to all four.

The Court: It will be admitted.

(Whereupon, Plaintiff's Exhibit No. 24 for identification was admitted in evidence.)

### Direct Examination

(Continued)

By Mr. Olson:

Q. Now, drawing your attention, referring now, Mr. Darcy, to plaintiff's identification 25, I will ask you who prepared that? A. I did.

Q. And to what scale? [432]

A. Same scale as the other, 15/100 of actual size.

Q. So that plaintiff's Exhibit 23 and plaintiff's identification 25 are to the same scale?

A. Same scale.

(Testimony of Patrick L. Darcy.)

Q. What is plaintiff's identification 25?

A. It is an exact representation of the excavation that we built a structure in on project 1062, Roza Division.

Q. And which structure does that refer to?

A. Number 427-428.

Mr. Holman: Same ones as the other?

A. Same as the other.

Mr. Olson: We offer plaintiff's identification 25 in evidence.

Mr. Holman: Same objection, your Honor.

The Court: Identification 25 will be admitted for the purpose of illustrating the testimony of the witness, or any others that may testify to the facts of this structure.

(Whereupon, Plaintiff's Exhibit No. 25 for identification was admitted in evidence.)

### Direct Examination

(Continued)

By Mr. Olson:

Q. Mr. Darcy, I notice certain humps on Exhibit 25 that are not present around the excavation on Exhibit 23. Could you just explain what those humps or elevations are?

A. That represents the dirt excavated from the excavation [433] here and thrown out on the banks, as it was at that excavation.

Q. Did you take those measurements yourself?

A. Yes.

(Testimony of Patrick L. Darcy.)

Q. Drawing your attention now to plaintiff's identification 26, I'll ask you what that is; or first, who made it?      A. I did.

Mr. Holman: May I ask a question, just general, with reference to 23; that was without a similar showing. In other words, it was not made from the ground?      A. No.

Mr. Holman: I understand; I just wanted to get that so I understood it.

Direct Examination  
(Continued)

By Mr. Olson:

Q. Who made plaintiff's identification 26?

A. I did.

Q. And to what scale, if it is to scale?

A. 15/100 of actual size.

Q. Would you explain, Mr. Darcy, plaintiff's identification 26 with reference to plaintiff's Exhibit 24, if there is any difference?

A. Exact duplicate.

Q. The identification 26 is made—what connection, if any, does plaintiff's identification 26 have with plaintiff's Exhibit 25? [434]

A. It was made to fit in here, to represent a completed structure in an excavation.

Q. Now, are the paneling or the wood portions of identification—well, I'll withdraw that, and offer plaintiff's identification 26 in evidence.

Mr. Holman: Same objection, your Honor.

The Court: It will be admitted.



(Testimony of Patrick L. Darcy.)

(Whereupon, Plaintiff's Exhibit No. 26 for identification was admitted in evidence.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Darcy, are the panels or the wood portions of plaintiff's Exhibit 26 identical with the wood portions of plaintiff's Exhibit 24?

A. Yes, with one variation.

Q. And would you explain to the Court that variation, and show it to the Court?

A. On these two pair of strong-backs, they had to be a little bit different to fit the excavation.

Q. Just explain it to the Court, and why this structure is different from the other one.

A. The reason being for those shaped as they are, the carpenters had to chop the end of the strong-backs to get them in against the form, between the form and the bank, to get clearance from the bank, so they could be put in there to tie the forms together for the pouring of the [435] concrete.

Q. And was that done on the structure form itself, as installed on the job in that particular structure, to which plaintiff's Exhibit 25 and 26 relate? A. They were.

Q. Now, Mr. Darcy, if you would take plaintiff's Exhibit 24, would you explain to the court

(Testimony of Patrick L. Darcy.)

and into the record just what that structure is, and what it does with reference to any weirs or gates?

A. This is a standard outlet with delivery for a road crossing, the road being as through there. This is the tile that comes from the outlet structure across the road.

Q. You are referring to a model concrete tile at the bottom of the structure?

A. Comes into this section here, is disbursed through a gate at this section, to weir out through here, weir being a measure for delivery, and what isn't weired out to this section of ground here continues on down the main lateral here.

Q. Now, on an actual panel, what type of lumber would be used in making those panels, and when you give the type of lumber, I'm not asking for grade, but the type of lumber, dimensions, point it out on this exhibit.

A. Two by fours would be used for plates and studs, strong-backs, supports, and corner blocking; one by eight ship-lap [436] used for sheeting on the outside panels of all structures except for the boxes and the exact interior of a structure, which are faced over the one by eight ship-lap sheeting with ply-wood.

Q. Show the ply-wood; and why was it used?

A. The ply-wood is indicated by the small line separation, the ship-lap by this line separation. That is used on the inside for facing to give a finished face when those forms are stripped off, and

(Testimony of Patrick L. Darcy.)

due to the necessity of having smooth surfaces to make the proper flow in regards to the planned hydraulics of this system.

Q. Now, I notice on this structure, plaintiff's identification 24—Exhibit 24, these little blocks with V-shaped markings on them. Would you explain that to the Court?

A. When the forms are stripped off the structure those blocks are stripped off over there and leave a key-way, for a plank, usually two by twelve, to drop down into this section, to control the flow to whatever is required to this section.

Q. Now, Mr. Darcy, I notice that there is one such wooden block that does not have the V-shaped marking, but which is wedged in, apparently, the other way. Would you explain that to the Court?

A. This block is put in the other way, into the concrete, with a bevel back into the concrete, so it can't come [437] out, for the purpose of screwing an enameled gauge plate on this at the crest elevation of the weir, corresponding to zero on the gauge plate, that measures accurately the water that goes through that weir.

Q. Now, directing your attention to Exhibit 23, Plaintiff's Exhibit 23, are there any portions of that that would be referred to as neat line, as that term has been used?      A. This is a neat cut.

Q. You're referring to vertical cuts on the inside of the excavation?

A. Yes. This is a neat cut here. These are neat cuts in these sections here.

(Testimony of Patrick L. Darcy.)

Q. And those are for what part of the structure?

A. These here serve the purpose of preventing underwash.

Q. What goes in there?

A. This is concrete; concrete is poured into this, into this undisturbed dirt, to prevent wash back under the structure.

Mr. Holman: That's what they call a head wall?

A. No, that's a sub-wall, or sub-wall trench, there.

The Court: Where is the head wall?

A. This is the head wall of this particular structure; the head of the structure, as pertaining to the flow of the water, where the water first reaches the structure, being designated as the head wall.

Q. Now, referring to plaintiff's Exhibit 25, Mr. Darcy, is that—you testified, I believe, that that exhibit is made to scale of the actual excavation into which the structure was actually placed?

A. That's right.

Q. Does that represent the excavation as it was actually prepared when your carpenters got to that particular excavation?

A. No, it doesn't.

Q. And would you state in what particular?

A. Our carpenters got to the excavation as it was presented to us for the purpose of erecting forms. This neat cut was off square at an angle like this. This one was full on this side by six inches. This had to be cut off six inches to nothing. This had four to nothing. These sub-fillets were not cut out; these sub-trenches were not dug; this bank

(Testimony of Patrick L. Darcy.)

came in on a parallel with this bank; we had to take this all out to make room to get the form in.

Q. And whose employees made those additional excavations?

A. The Concrete Construction Company.

Q. Now, Mr. Darcy, would you insert the two structures, Exhibits 26 and 24, in their proper excavations?

(Whereupon, a model of a man was marked Plaintiff's Exhibit No. 43 for identification.)

Q. Mr. Darcy, showing you plaintiff's identification 43, I'll ask you what that is?

A. That is a clay replica of a man to scale, made to correspond with these demonstrations.

Q. What is the scale of that identification 43 with reference to Exhibits 23 to-26?

A. It is built on a scale of 15/100 of actual size of a man approximately five feet ten inches.

Q. So that these four exhibits, 23 to 26, and identification 43, assuming that the man represented by identification 43 is five feet ten, would be to the same scale, is that a true statement?

A. That's right.

Mr. Olson: We offer plaintiff's identification 43.

Mr. Holman: Let me see him.

Mr. Olson: Handle him with care!

Mr. Holman: No objection, as illustrative of the witness' testimony, your Honor.

The Court: It will be admitted for that purpose.

(Testimony of Patrick L. Darcy.)

Mr. Holman: I'm about five feet ten myself, and I'm not sure it's correct.

Mr. Olson: Well, it's to show a comparison of this with the size of a man.

(Whereupon, Plaintiff's Exhibit [440] No. 43 for identification was admitted in evidence.

(Whereupon, a complete she-bolt set was marked Plaintiff's Exhibit No. 44 for identification.)

Direct Examination  
(Continued)

By Mr. Olson:

Q. Mr. Darcy, handing you plaintiff's identification 44, I'll ask you what that is?

A. A complete she-bolt set.

Q. Now, how do you spell that she, is it s-h-e?

A. She, that's right.

Q. Now, you say it is a complete she-bolt set. What, if anything, has it to do with the specifications 1062?

A. It's used for tying the inner and outer panels together, to keep them from spreading when the concrete is poured into them.

Q. Is that one that was actually used on the job?

A. Yes, this is from stock that was used on the job.

Q. And is it similar to that used in each of the structures?



(Testimony of Patrick L. Darcy.)

A. Yes, they were used repeatedly all the way through the project.

Mr. Olson: We offer plaintiff's identification 44 in evidence.

Mr. Hawkins: No objection.

Mr. Holman: No objection.

The Court: Admitted. [441]

(Whereupon, Plaintiff's Exhibit No. 44 for identification was admitted in evidence.)

### Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Darcy, handing you plaintiff's Exhibit 44, would you explain what relation it has, if any, to plaintiff's Exhibit 24?

A. There would have been used one of these sets at each one of these sets of strong-backs on all of these panels, completely through from the outside to the inside, all the way around, to tie that form together to receive concrete.

Q. Doesn't that leave a hole in the concrete?

A. It leaves a hole in the concrete where these two cones rest in there, and where that plugs goes through; those have to be filed.

Q. Now, illustrate to the Court the operations of that with reference to holding the form in place. I'm referring now to plaintiff's Exhibit 44.

A. This is the spreader part, two cones and a connector.

(Testimony of Patrick L. Darcy.)

Q. It's in the center?

A. It's in the center; that designates or controls the thickness of the concrete wall. These are screwed opposite for adjustment, and these are inserted through a hole in the wall between the strong-backs, and screwed up to a certain place.

Q. You're now referring to the round part?

A. Yes, the form being in about this area, and the strong-back from there to the plate, then the tension is taken up of the forms against these spreader cones here by this wedge. It makes a tight form at exactly the thickness the wall must be.

Q. Now, once that is in place and the concrete poured and set, so that the form is ready to be removed, what is done with reference to the she-bolt, plaintiff's Exhibit 44?

A. These wedges are driven back to loosen, and the plates snapped off, the strong-backs removed by turning out from under the plate, and these screwed out of the cones; then the form can be taken away from the concrete, leaving this in the face of the concrete, which has to be removed with a wrench made specially for the purpose. I haven't a wrench with me, but a wrench would fit in that hole and take the cones out, leaving a void in that wall.

Q. The same with reference to the other cones?

A. These are drove out.

Q. By "these" you're referring to what?

A. These connectors. After the cones are removed from both sides we usually drove these out

(Testimony of Patrick L. Darcy.)

from the hole, where they would come free. Where they didn't we left them in and closed the hole at the surface. [443]

Q. When the bolt was removed what was done with the hole left in the concrete?

A. That was filled entirely through the wall.

Q. With what? A. Grout.

Q. All right; now, would you explain, Mr. Darcy, and compare the removal of the she-bolt and panels with reference to the combination exhibits plaintiff's Exhibits 23 and 24, as against the combination Exhibit 25 and 26?

A. Compare?

Q. Compare the performance that you would go through. A. On this structure here?

Q. You're referring now to Exhibit 23 and 24.

A. A nail puller would be used to separate these panels here, where they're nailed together, and the she-bolts loosened and screwed out of these strong-backs; the strong-backs, nails would have been used in here, pulled by a hammer, and then this panel would drop away freely from the concrete and be removed from the hole.

Q. Referring now to 25 and 26?

A. This bank was so close here on this particular structure they were unable to get she-bolts in there. This was blocked on the bank and spreaders put inside the box to keep them from collapsing. She-bolts were used only out in these free portions here where they could be [444] reached and re-

(Testimony of Patrick L. Darcy.)

moved. Those two sets in the bottom had to be blocked. This one here we used she-bolt on it, where it could be reached.

Q. Now, what would be the situation with removing the panels themselves after the she-bolts or other blocking were removed?

A. These panels, we were unable to get them out without force.

Q. You're referring now to the outside forms?

A. This deep section, from this point over to this corner, were so tight in there from dirt having been broken off this sharp vertical bank and wedging down in behind, along with the blocks placed in there, they could not be taken out by hand, and had to have a cable tied around it and pulled out with a truck, which wrecked it, approximately a diamond shape, and destroyed the useability until that could be reconstructed. These panels back to here, these strong-backs, would be removed, and then what dirt was binding them around the bottom would be dug out to get those out.

Q. And who would do that excavating to remove those panels?

A. Well, the concrete crew, having no concrete to pour, stripped this particular structure, the various men in the crew.

Q. Whose crew? [445]

A. The Concrete Construction Company crew; the names I couldn't say without checking the time vouchers.

(Testimony of Patrick L. Darcy.)

Q. I don't care about that. Mr. Darcy, how does the excavation as indicated by plaintiff's Exhibit 25 compare in general with the total excavations that were made on the project by Macri and Company with reference to the subwalls and slopes on the bank, and so forth?

A. That is a very comparative example of all the excavations from beginning to end of the job.

Q. And why did you pick this particular one rather than any other, or is there any reason?

A. Yes; at the time it was decided this procedure would be necessary, this was the last one in progress of the work that hadn't been back filled, and it was near the road where it could be gotten to easily and checked; plain case of necessity, by an engineer.

Mr. Olson: While we're here, would the Clerk mark these panels for identification?

(Whereupon, inside panel used in structures was marked Plaintiff's Exhibit No. 45 for identification.

(Whereupon, inside panel used in structures was marked Plaintiff's Exhibit No. 46 for identification.

(Whereupon, inside panel used in structures was marked Plaintiff's Exhibit No. 47 for identification. [446]

(Whereupon, inside panel used in structures was marked Plaintiff's Exhibit No. 48 for identification.)

(Testimony of Patrick L. Darcy.)

Q. Before I get to these next identifications, Mr. Darcy, I think we should also ask you what is the approximate width of one of these outside panels, exclusive of what you term the strong-backs?

A. You mean thickness?

Q. Thickness, yes, that's what I should have asked you, thickness.

A.  $4\frac{3}{8}$  inches, including 2 x 4 stud and 1 x 8 ship-lap sheeting.

Q. Now, these strong-backs you refer to, just point out what are the strong-backs.

A. These.

Q. And what function do they perform with reference to the form?

A. They bind across all the studs, to keep them in perfect alignment, so there will be no waver in the wall when the pressure goes on.

Q. And including the strong-back, how wide would that make the outer form panel?

A. Eight inches.

Mr. Holman: That would be eight inches over-all?

A. You've got two times  $3\frac{5}{8}$ , plus  $\frac{3}{4}$ . [447]

Mr. Holman: Pardon me; two times what?

A.  $3\frac{5}{8}$ .

Mr. Holman: I thought you said  $4\frac{3}{8}$ ?

A. Including stud and ship-lap.

Q. Now, how much of plaintiff's Exhibit 44, being the she-bolt, would extend outward from this strong-back? A. Approximately  $2\frac{1}{4}$  inches.

Q.  $2\frac{1}{4}$  inches?

A. You can see the thickness.



(Testimony of Patrick L. Darcy.)

Q. Approximately  $21\frac{1}{4}$  inches. Now, referring now, Mr. Darcy, to plaintiff's identification 45, will you state what it is?

A. That's one of the panels used for building these inside boxes or form cores. That's the one that has to have the ply-wood facing to make a slick finished wall on the inside.

Q. It is an inside panel? A. Yes.

Q. And what with reference to plaintiff's identifications 46, 47, and 48?

A. These are two panels off of another side of the same type of box.

Q. You're referring to 46 and 47?

A. 46 and 47; 48 is a discarded portion of one.

Q. Now, are those panels that were actually used on the [448] project?

A. Those were used on the project all the way through, until they had to be discarded for lack of use.

Mr. Olson: We offer plaintiff's identifications 45 through 48 in evidence.

Mr. Holman: Are those the ply-wood?

The Court: Do they all have ply-wood facing?

Q. The inside panels. These identifications 45 to 48 all contain plywood, do they not, Mr. Darcy?

A. Yes, they're all ply-wood faced.

Mr. Olson: All inside panels.

Mr. Holman: No objection, for the purpose of illustrating the witness' testimony, your Honor.

The Court: Admitted.

(Testimony of Patrick L. Darcy.)

(Whereupon, Plaintiff's Exhibit No. 45 for identification was admitted in evidence.

(Whereupon Plaintiff's Exhibit No. 46 for identification was admitted in evidence.

(Whereupon Plaintiff's Exhibit No. 47 for identification was admitted in evidence.

(Whereupon, Plaintiff's Exhibit No. 48 for identification was admitted in evidence.)

### Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Darcy, with reference to the outside panels, would they be likewise faced with plywood? [449]      A. No, it wasn't necessary.

Q. So, what would be the—how would the outside panels, then, differ from Exhibits 45 to 48, as to materials you could make them of? I'm not asking as to size, but as to material?

A. Well, the same material, except the plywood facing.

Q. And why is there that difference?

A. Because the outside requires less of a smooth surface, where it is back-filled against it, it is not as particular as the inside, where the smooth flow of water is part of the design of hydraulics of the Bureau of Reclamation.

Q. Do the Bureau of Reclamation specifications call for plywood on the inside of the panel?

A. Yes.

(Testimony of Patrick L. Darcy.)

Q. Now, I notice on plaintiff's Exhibit 45 that it is not apparently, one solid piece of plywood. Could you explain the reason for that, if any?

A. Well, as this edge shows here, the plywood had been bruised from use and re-use until it was beyond use to produce a smooth surface. It had to be removed and pieces patched in, because there was nothing to make new panels, as there should have been, until finally we had so many pieces so rough and edged off that they were beyond use at all. [450]

Q. Well, why did you do that, instead of making a new face for the panel, Mr. Darcy?

A. Because there was no plywood to make new faces for it.

Q. And what is the tin covering that is on the edge of these exhibits?

A. Well, these instances here we had to use a piece of plywood that had a smooth edge on one side, and then a piece of tin to cover the other edges with to produce a smooth surface over the wrecked edges where they come together.

Q. Now, with reference to the time that it would take to re-patch a panel as shown by these exhibits 45 to 48, how would that compare with the time element that would be involved to put a new entire piece of plywood over it?

A. Well, I'd say it would take at least three times as long to patch it up, on an average; some longer. I don't think it would take any less than three times that long.

(Testimony of Patrick L. Darcy.)

Mr. Olson: All right, would you return to the stand?

(Whereupon, album of photos taken on job 1062 and 1068 was marked Plaintiff's Exhibit No. 49 for identification.)

Q. Mr. Darcy, handing you plaintiff's identification number 49, I'll ask you to state what that is?

A. It is an album of pictures that were taken on the work [451] on project 1062 and 1068.

Q. And who took the pictures?

A. On the first page the Bureau of Reclamation took the pictures.

Q. All right, speaking of the first page, then, if the Bureau of Reclamation took those pictures, I'll ask you to state what each of those pictures are.

Mr. Holman: Well, just——

Q. It is just a picture of the mixer.

A. It was taken for the purpose of showing the equipment used on the job.

Mr. Hawkins: I move that be stricken, your Honor. It was taken by the Reclamation Bureau, and this witness is testifying what their purpose is.

The Court: It will be stricken.

Mr. Olson: I agree. I'm going to offer it just for the purpose of showing what this buggymobile is. I don't think there will be any objection to it.

Mr. Holman: We haven't seen it, Mr. Olson.

The Court: No, they haven't seen it.

Mr. Holman: Go ahead.

(Testimony of Patrick L. Darcy.)

Q. There's some notations under those pictures. Who made those notations? A. I did.

Q. And who assembled that album? [452]

A. I did.

Q. Are those, then, actual photographs taken of the physical properties shown on the different pictures, out on jobs 1062 and 1068? A. They are.

The Court: Let's see, was there any testimony as to who took the pictures, other than the first page?

Q. I don't think there was, your Honor. Who took the pictures outside of the ones on the first page, Mr. Darcy? I'm sorry, your Honor; I had understood that he had taken all of them, and perhaps he did not, some of them.

A. Page 5 is a reproduction of the four colored pictures previously admitted, and including all of the first four pages, with the exception of one picture, were taken by William E. Schaefer. The balance of it I took.

The Court: Did you say the first five pages, other than the one of the Bureau of Reclamation, were taken by William E. Schaefer?

A. Page 2, 3, 4, and 5, with the exception of one picture.

Q. Which picture do you except?

A. The one showing William E. Schaefer in the yard with the fellows.

Mr. Holman: I misunderstood. I thought he said except the first page, the first four pages were by [453] William E. Schaefer.

(Testimony of Patrick L. Darcy.)

The Court: 2, 3, 4 and 5 were by William E. Schaefer, except one picture.

Q. The one in the lower right was taken by another man?      A. Right.

Q. Who took that picture?

A. I wouldn't know.

Q. Which page is that?      A. Page 5.

Q. The rest you took?

A. With the exception of page 6, which is a reproduction of the colored pictures previously admitted, taken by M. C. Schaefer of the lumber, including one on page 7 of the same set.

The Court: What are those lumber pictures?

The Clerk: Plaintiff's 41.

Q. Now, what about the rest?

A. The rest of the pictures, then, I've taken.

The Court: Did he testify that the first page was a representation of equipment used by the plaintiff on this job?      A. Yes.

Q. Are they, Mr. Darcy?

A. Yes, that's the equipment we used.

Q. Mr. William E. Schaefer is here. I'll show these to [454] counsel. If there is an objection as to properly identifying the first few pages, I would like to put Mr. Schaefer on for that purpose.

Mr. Hawkins: I object. I don't think the exhibit has been properly identified yet. There is no showing when they were taken.

The Court: That's right, there was no question of the date.



(Testimony of Patrick L. Darcy.)

Q. When were the pictures taken?

A. Each picture will speak for itself, if not on the picture itself, on the margin, or on the back of the picture.

Q. Well, can you tell me what year they were taken?

A. 1944 and '45, on the Roza Project, 1062 and 1068.

Q. And when with reference to the actual performance of the job itself?

A. Well, scattered along all the way through it, from beginning to end.

Q. Are there any notations in here, Mr. Darcy, that give the date each picture was taken?

The Court: He asked him if the notations under the pictures showed the dates of them. I anticipate there might be objection to the written matter there. I don't know; perhaps there won't be.

Mr. Hawkins: I would like to know when those pictures [455] were taken. I don't think any notations made on the book would be any evidence when they were taken.

Mr. Olson: The witness has testified when they were taken.

Mr. Hawkins: He testified they were taken from beginning to end. That's not sufficient.

Witness: Each picture has a date on the back side of it.

Mr. Hawkins: On the back side of it? They're all in the book.

(Testimony of Patrick L. Darcy.)

The Court: We'll recess for ten minutes. If counsel can't get together on whether these pictures can be admitted, then there will have to be further testimony, I suppose.

(Short recess.)

(All parties present as before, and the trial was resumed.)

Mr. Hawkins: Your Honor, during recess I've examined this album, and I certainly object to the admission of it in evidence now. All the way through this book we find comments like this, beginning on the first page: "Excavation banks too close, and straight up." "Dirt dug close to underfoot, making all operations highly expensive."

The Court: It would be my view that any written [456] matter under the pictures would not be admissible. I think even if the witness wrote it it would be self-serving. Do you have anything to say, Mr. Olson?

Mr. Olson: No; my thought would be Mr. Darcy would testify to the same things, and that the only purpose of that would be explanatory to your Honor. I appreciate, your Honor, it is argumentative, and I also appreciate there are some things in there that are proper to the identification. I think it is very desirable to have it set up in book form, and if I can offer it to the exclusion of the written matter, or if it is deemed better to have it deleted with a black pencil, or taped over or something, I can then go through the album and have

(Testimony of Patrick L. Darcy.)

Mr. Darcy testify to what each structure, or what portion of the project it is, I think.

Mr. Hawkins: Just as a matter of policy, I don't like to have a document of this kind go into evidence with these repeated remarks of the same character, page after page. I realize the trial court has the picture in mind, but the appellate court would not; of course they would read what is under the picture; they would be bound to do that.

The Court: I think it is inadmissible unless it is possible to delete them or paste something over them.

Mr. Hawkins: These pictures are easily removable; [457] why not take them out?

Mr. Olson: We would have to delete it on the back, too. Does this other sheet have the same notation on the back?

Mr. Hawkins: I think if the witness testifies these are accurate representations of a particular spot at a particular time, I think they are admissible for what they are worth, but I certainly object to them going in in this form. It is not proper.

Mr. Holman: I join, your Honor.

The Court: Well, I don't know that an offer has been made, but I will indicate that the writing wouldn't be admissible, under the pictures or even on the back of the pictures.

Mr. Holman: I think the Clerk can take it off the back of the pictures, your Honor.

The Court: Is that in pencil?

Mr. Holman: For the most part.

(Testimony of Patrick L. Darcy.)

Mr. Olson: There's some notations on the back I don't think you have any objection to; the date the picture was taken, for instance. "Note very evident lack of two by fours; this space should be well filled;" I don't contend that is proper, your Honor.

The Court: I wonder if you could proceed with this witness on some other point, and then on the overnight [458] adjournment prepare your pictures and bring them back with the written matter erased on such as you want to use?

Mr. Olson: Well, I'm going to have to go over them again.

The Court: The Clerk says he has some heavy gum paper that could be pasted over the writing on the back.

The Clerk: Or on the front of it.

The Court: Well, we'd still have the difficulty there, unless the pictures were securely pasted into the album, and they're not, you would still have the writing on the back that could be read if anyone lifted it out and looked at it. I've been on an appellate court bench; I know that may likely happen, too.

Mr. Hawkins: I don't know that it would necessarily influence the Court; probably wouldn't, but at the same time, as a matter of policy, I don't like to have it.

Mr. Olson: I see counsel's position. Your Honor, I was going to take these pictures and go through them one by one, but I'll pass it for the time being.

(Testimony of Patrick L. Darcy.)

Direct Examination

(Continued)

By Mr. Olson:

Q. Now, Mr. Darcy, when you went on the project, that was August—what date, again?

A. That's when I took over superintendency of the job. [459]

Q. What date was that?

A. That was the 10th of August.

Q. When did you first go on the job?

A. The 29th of June, 1944.

Q. As I understand it, then, you were on the jobs from June 29; you were superintendent from August 10, '44?

A. That's right.

Q. Now, on June 29, when you went on the job, what was the situation with reference to the number of excavations, if any, that had then been made, if you know?

A. There were considerable rough excavations. A few were fine graded, supposedly.

Q. What do you mean by that?

A. The first thing we did when we went on the job was to start checking those excavations to see if they were right.

Q. And were they?

A. We found none; in two laterals we checked that day we found no excavations that had the right elevations and sub-grades.

Q. And what was the conditions with reference to the banks?

A. All approximately vertical.

(Testimony of Patrick L. Darcy.)

Q. Now, then, on August 10, 1944, approximately how many structures, if any, had been completed?

The Court: What was that last date, please?

Mr. Olson: August 10, 1944, when Mr. Darcy became superintendent.

A. About 70 had been completed, and four or five under construction.

Q. Four or five? A. Yes.

Q. Now, from that time on, as I understand it, you were in actual charge of the operations?

A. That's right.

Q. Now, would you explain, Mr. Darcy, what took place from then on with reference to your difficulties, if any, in the placing of structures in the excavations?

A. Well, every time we come to an excavation and started erecting a form for a structure we found the same hazard, the same thing wrong with all of them, from the beginning. The grades would be wrong, the banks would be too close; we would have to start the first thing in the hole to shovel out and make room to do the work of setting the forms, put the grades down to the proper elevation, some had to be cribbed and back-filled, where they had over-excavated; on neat cuts some neat cuts were off square; quite a few of the structures were off square, or off the lateral line. Occasionally we found one that was several feet from the center line of the lateral. Those and some of the worst ones we had to pass up. We [461] couldn't put any time on excavation on them. We only excavated on the ones



(Testimony of Patrick L. Darcy.)

that were the least bad, to be able to keep the crew doing something, to keep the crew from standing out in the desert all the time, and I would chase all over all the time hoping to find somebody responsible from Macri's operations to do that for us. Sometimes I couldn't find any, I had to let the carpenters go ahead and dig it out so they could keep them going.

Q. With reference to the finished or hand grading on these excavations, did you complain to Mr. Macri or his foreman about it?

A. A couple of times I complained directly to Mr. Macri, although I didn't see him very often. I usually put my complaints in to his superintendent.

Mr. Holman: For the purpose of the record I move that answer be stricken as immaterial, for the reason that the sub-contract provides if there is any delay or hazard caused by the principal contractor, he shall be given five days' notice and a chance to correct it.

The Court: It will be overruled.

Q. Would Macri and Company's men return—that question may be a little suggestive; Mr. Darcy, what would happen when you complained to Mr. Macri's men or his superintendent about the excavations?

Mr. Holman: Just a minute; can we have a time fixed, [462] and what men, and where? Is it general?

Mr. Olson: It is general. If I took each excavation—I can do it, but——

(Testimony of Patrick L. Darcy.)

The Court: I'll overrule the objection.

A. Well, if I found his superintendent, and give him any complaint, he always made an effort with what he had available to correct whatever was wrong. Usually he didn't have sufficient help to get it done immediately, but eventually he got somebody around to get it straightened out.

Q. Now, what I want to get at, Mr. Darcy, is the typical situation where your carpenters would come up to an excavation, as you related, and found the excavation not completed for the installation of the concrete structure, just what would be done, if anything?

A. The first thing they did was get their line from the hubs, their elevation, to check their grades, their center line, their head wall angles. If the excavation didn't correspond to what was required in the reference hub, then if it wasn't too badly off they'd start to work to dig the thing out, to make it right.

Q. And on those that were too badly off, as you put it, what would you do then?

A. Pass them up and call help from Macri's crew to come back and correct their work. [463]

Q. And did they come back when you requested them, on these occasions?

A. With very few exceptions he always got somebody back, when they could.

Q. And after they came back what was the situation then with reference to what you found?

(Testimony of Patrick L. Darcy.)

A. Sometimes the help they had understood sufficiently to be able to get the thing straightened out, and sometimes they didn't. After several occasions of having them come back three times on an excavation, one time four times, we finally went ahead and finished them out ourselves, a little bit of hand work to get them correct.

Q. How much, particularly with reference to man hours, or time, would your men and you spend on hand excavation on these excavations in order to install your forms?

A. Well, it would run from a half hour up to an instance of one hole had sixteen hours; it varied.

Q. I appreciate it would vary. This sixteen hours on one, that's one excavation out of many. How would they run generally, Mr. Darcy, if you can tell?

A. Oh, an average of between two and a half to four hours.

Q. Now, what is the situation with reference to excavations being completed ahead of you, to the extent that there were always holes to work on, for your men?

A. Well, it was rarely that we had enough holes ahead to set [464] forms in, without having corrections made to keep them going steady.

Q. And on the excavation as made by Macri and Company, what was the situation with reference to lateral clearance on the outside of the form or the structure to be installed; what was the lateral clearance?

(Testimony of Patrick L. Darcy.)

A. A foot or less on at least 95 per cent of all excavations.

Q. Did you say a foot or less? A. Yes.

Q. And are you referring to the bottom, or the top, or what part of the excavation?

A. At the bottom or the sub-grade, at the foot of the existing side banks, outside banks.

Q. And what was the situation as far as the top was concerned?

A. Very little slope; maybe two or three inches in an average outside bank.

Q. Now, with reference to the lumber, Mr. Darcy, was there lumber, or what was the situation with reference to the lumber that was supplied you by Macri and Company, both as to quality and as to the time that it was furnished you?

A. There was no lumber when I first went on the job. One thing that was wrong with the job was it wasn't moving when I went up there, because there was no lumber to finish setting or tying up forms, to put on strong-backs, [465] or placing it.

Q. What date was that?

A. That was the 29th of June, 1944. Approximately the 8th or 9th of July we got a small load of lumber, about 1500 feet of ship-lap and a few two by fours, and we did a little form setting with that; it didn't last long. It was fair grade. We repeated our request for lumber on an average of at least four times a week. Lumber was never there when we needed it, and we would be promised at least twice a week for sometimes six or seven weeks

(Testimony of Patrick L. Darcy.)

that we would be having a load of lumber within a few days, and it never came. One load of lumber that came in was tongue and groove, which will not work in with ship-lap without a lot of extra cost. We had to use it. We received one load of lumber about the middle of September, mixed lumber, used previously on some other job. As near as that type of stuff could be tallied, I tallied 4800 feet of it, a sample of which we have here. That's an average of the grade of the entire load of that delivery.

Mr. Holman: Pardon me, it's hard to hear you here. You said the entire load, or lot?

A. That is an average of the grade of the entire load of that delivery.

Q. Are you referring to plaintiff's Exhibit 29, which I am holding in my hand? [466]

A. That's it.

The Court: When was that delivery, did you say?

Q. When was that delivery?

A. That was made right close to the middle of September.

Q. Of 1944?

A. I would say—yes—I would say between the 10th and the 15th, pretty close.

Mr. Holman: I'm sorry, but just for some reason I can't get this witness on dates. I couldn't hear you.

A. Between the 10th and 15th of September, 1944.

Q. Now, when you would request additional lumber, would it always be furnished promptly?

A. Never.



(Testimony of Patrick L. Darcy.)

Q. What did you have to do, then, with reference to making your panels and forms?

A. Well, a lot of times, to keep operating, we had to dismantle panels that we had in the yard, that wouldn't be used for some little time, to make up panels that had to be had right away to keep the structures going in a sequence of operation. Then when we finally did get lumber we had to re-fit those panels, and some that they had to borrow the two by fours out of we had to completely rebuild. At times we had to go out and take the strong-backs out of forms just poured a few hours, and rush those ahead to tie up forms to receive concrete, due to [467] lack of two by fours.

Q. Now, in removing the panels from the structures in these vertical excavations, did you experience any difficulty with reference to removing those panels?

A. Always difficulty removing the panels from the outside.

Q. Was there any damage done to the panels in removing them?

A. Considerable damage done to practically all of them.

Q. And what did that necessitate, if anything?

A. Well, the panels had to be all hauled back to the yard, some of them re-built, pieces replaced on all of them, sometimes an edge would be broken off, usually on the deeper panels the bottom plate would be left in the ground, lost there, and afterwards it would have to be dug out with a shovel, to get the



(Testimony of Patrick L. Darcy.)

wood away from the structure. They all had to be hauled back to the yard and repaired or replaced.

Q. Mr. Darcy, how long, or over what period of time, assuming that you would have had excavations made and ready for you with a bank of a one to one slope, and with a lateral clearance of one foot at the foundation of the structure to the outside of the concrete portion of the structure, and lumber furnished of the proper quality and on time, how long a time would it take to have completed the concrete pouring operations on 1062?

Mr. Holman: Your Honor, I will object to that for [468] the purpose of the record on the ground that the hypothetical question contains elements that have not been supported by the evidence, and that it is immaterial anyway, under the terms of the contract and the sub-contract.

Mr. Ivy: I join in that objection.

The Court: Overruled.

A. I don't think it would have taken over three and a half months at the very outside, to have completed 1062.

Q. And if you could have been working on 1068 at the same time, how long would it have taken you under the same set of facts to have completed both projects?

Mr. Holman: The same objection, your Honor, plus the objection that it is not shown that they had the equipment to handle two jobs at once. It has not been shown here.

The Court: Overruled.

(Testimony of Patrick L. Darcy.)

A. Six months would be plenty of time to have completed both projects, operating simultaneously.

Q. Did you complete the concrete work with reference to structures on 1062? A. Yes.

Q. And on what date?

A. Do you mean the last concrete that was poured, or the stripping and finishing? [469]

Q. No, I'm talking about the completion of the project itself.

A. The 7th day of April, 1945.

Q. Now, what was the situation, Mr. Darcy, with reference to where Mr. Macri's men were working on the excavating and your carpenters and men were working on the concrete structures, as to how far ahead Macri's men were from your men, throughout the job?

A. With very few exceptions they were always in sight, right immediately in front of us, and when they had corrections to make, called back to correct an excavation where we were working, innumerable times they were working in the same excavation with our carpenters. They worked on one side of the hole and the carpenters on the other side, to keep things going both ways.

Q. And there's been testimony about a chute and a spillway or spilling pool——

A. That's "stilling pool."

Q. Thank you; what part of the project was that?

A. That was the turbine lateral system.

Q. Was it the first part of the project?

A. It was in the center of it.

(Testimony of Patrick L. Darcy.)

Q. Center of it; with reference to the latter part of the project, or the end of the project, Mr. Darcy, where were Mr. Macri's excavating men with reference to Concrete [470] Construction Company's men, on the completion of the project?

A. Our last structure that we built outside of the chute, we had fine graders working cutting the sub-wall trenches, removing excavated dirt from underneath our steel that was placed in the floor, for the floor slab; they were working right in the carpenters' way, removing that dirt, and on the chute, right to the time the chute was set, we had their fine graders digging out for that chute-way so those forms could be set and have the right clearance underneath.

Q. I was asking about this chute; I thought you told me it was in the center of the project?

A. It is mid-way in the project, but it was our last work.

Q. You're talking about location, when you say the center part, then?           A. Right.

Q. I was talking about time; that's what threw me off. Then this chute and stilling pool was, with reference to time, what part of your work?

A. It was the last of the work we did on the project.

Q. You say Mr. Macri's men were doing their fine grading and fine excavating right with you?

A. Yes.

Q. Were there any roads—let me ask you this; what was the [471] road situation on the project?

(Testimony of Patrick L. Darcy.)

A. Outside of county roads, there were very few even small pieces of anything resembling a road.

Q. Well, did Macri and Company build any roads?

A. A few spots where they couldn't navigate themselves they fixed some semblance of a road.

Q. Mr. Darcy, do you remember my reading from one of the field reports of Mr. Reynolds to the effect that the carpenters standing around fires, or did I read from that?

A. Yes, I heard it; I think he read it himself.

Q. I thought there was only three or four of those, your Honor. Right now when I'm trying to, I can't find my notes on which one that is. Here it is. Referring to defendant Macri Exhibit 13-m, the field inspector's report under date of January 20, 1945, under remarks; "Carpenters standing around fires hours at a time (as usual) waiting for materials, weir, flumes, boxes, and so forth; also finishing structure then not knowing where to go"; did that situation—it seems to be followed by "Where's Mr. Darcy"; did that situation exist there on the project, Mr. Darcy?

A. It did during the month of January and part of February.

Q. And what was the reason for it?

A. We had practically every piece of form material that we [472] had made set in the field, ready for pouring concrete. We had a crew, no material. Our request for further material to complete set-

(Testimony of Patrick L. Darcy.)

ting forms was refused until we had poured up on what we had set, and could move those ahead.

Q. Referring to the same exhibit, Mr. Reynolds' field report under date of January 20, 1945 "Five carpenters lost around two and a half hours that I know of, waiting for materials to be hauled from yard. The carpenters off in afternoon." Were there materials at the yard at that time, waiting to be hauled out?

A. They were waiting for a Macri truck to go down to 1068 to bring the material back to the yard so it could be prepared to take it out to the field. Nothing to do in the meantime until that material was returned.

Mr. Olson: Now, subject to those pictures, your Honor, counsel may examine.

The Court: Yes, it will be understood that you may recall the witness if you wish to further identify these pictures and offer them. You may cross-examine.

### Cross-Examination

By Mr. Holman:

Q. Mr. Darcy, who had preceded you as superintendent?

A. For Concrete Construction Company?

Q. Yes, on the job? A. Mr. Fred Waltie.

Q. Fred Waltie; and did you also succeed, or were you followed by Mr. Schaefer as superintendent?

A. Mr. Schaefer was the general superintendent.